

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

COMMENCED TERM, ~~1920~~ 1920

No. ~~100~~ 215

THE UNDERWOOD TYPEWRITER COMPANY, PLAINTIFF
IN ERROR,

FREDERICK S. CHAMBERLAIN, TREASURER OF THE
STATE OF CONNECTICUT.

ON ERROR TO THE SUPERIOR COURT OF THE STATE OF
CONNECTICUT.

FILED NOVEMBER 2, 1920

(27,400)

(27,408)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 653.

THE UNDERWOOD TYPEWRITER COMPANY, PLAINTIFF
IN ERROR,

vs.

FREDERICK S. CHAMBERLAIN, TREASURER OF THE
STATE OF CONNECTICUT.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF
CONNECTICUT.

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1 To the Sheriff of the County of Hartford, his deputy, or either constable of the Town of Hartford, greeting:

By authority of the State of Connecticut, you are hereby commanded to summon Frederick S. Chamberlain, of the Town of New Britain, in said County and State, as he is Treasurer of said State, to appear before the Superior Court, to be holden at Hartford, in and for the county of Hartford, on the first Tuesday of November, 1916, then and there to answer unto the Underwood Typewriter Company, a corporation duly organized under the laws of the State of Delaware, having its principal office in the State of Delaware, at the city of Wilmington, County of New Castle, and its main office in the City of New York and State of New York, in a civil action wherein plaintiff complains and says:

1. This action is brought under and by virtue of the provisions of Sections 27 and 28 of Chapter 292 of the Public Acts of 1915.

2. That the plaintiff or applicant is a corporation duly organized under the laws of the State of Delaware, having its principal office in the State of Delaware, at the City of Wilmington, County of New Castle, and its main office for the transaction of its interstate business at the City of New York and State of New York.

3. That the plaintiff is engaged in the business of manufacturing, buying or otherwise acquiring, selling, renting, repairing, operating, distributing and general trafficking and dealing in writing machines, duplicating machines, mechanical novelties, typewriters of any and every description, typewriter materials, appliances and inventions, and all materials and articles connected with or in any wise relating to the manufacture, sale or use of writing machines, dupli-

2 cating, adding, calculating and numbering machines and devices, and in connection with such business maintains a factory in the City of Hartford, State of Connecticut, and said plaintiff as its principal function is engaged in interstate commerce consisting of sales and agreements for the sale and rental of its products and merchandise manufactured by it and acquired by it entered into and made in certain states of the United States for delivery and use in other states and in foreign countries, and of the transportation and delivery of its products and merchandise manufactured by it and acquired by it to the consumers, buyers or lessees thereof residing or located in states other than those where such sales or contracts of sale or leases are made and in foreign countries. And the greater portion of the receipts, earnings and income of the plaintiff is derived from and acquired through such interstate commerce, and is earned, received, held and possessed by the plaintiff in various states of the United States other than the State of Connecticut and in foreign countries, and but an insignificant portion of the receipts, earnings and income of the plaintiff is earned, received, held, possessed or located within the borders of the State of Connecticut,

4. That the plaintiff maintains offices for the transaction of intrastate business in the Cities of Hartford and New Haven, in the State of Connecticut, such business consisting of the sale and rental of its products and merchandise, to buyers and lessees residing within the State of Connecticut, but the amount of intrastate business so done constitutes but a very small portion of the total business done by the plaintiff. That the plaintiff is chiefly engaged in the State of Connecticut in interstate commerce consisting in the performance on its part of agreements for sales and leases of its products and merchandise entered into and made in certain states of the United States for delivery in other states and in foreign countries by the delivery of such products and merchandise to common carriers within the State of Connecticut for transportation and delivery to the consumers, buyers and lessees thereof residing or located without the State of Connecticut, and in states other than those where such sales or contracts of sale or leases are made, and in foreign countries.

5. That by far the larger part of the capital property and assets of the plaintiff are permanently invested and located beyond the limits of the State of Connecticut, and by far the larger part of its capital, property and assets are used and employed for the interstate commerce portion of its business, and in no way concerns the domestic or intrastate portion of its business conducted wholly within the State of Connecticut.

6. That sections 19 to 23 inclusive of Chapter 292 of the Public Acts of 1915 of the State of Connecticut provide as follows:

Sec. 19. The term "company" as used in this part shall include every corporation, joint stock company, or association carrying on business in this State which is required to report to the collector of Internal Revenue for the district in which such company has its principal place of business for the purpose of the assessment, collection, and payment of an income tax, except insurance and trust companies, state banks, savings banks organized under the laws of this State, banking institutions organized under the laws of the United States and located in this state, express companies carrying on business on steam or electric railroads or street railways, steam or electric railroad or street railway corporations, companies whose principal business in this state is furnishing, leasing, or operating dining, sleeping, chair, parlor, refrigerator, oil, stock, fruit, or other cars, corporations whose principal business is manufacturing, selling, and distributing illuminating or heating gas, or electricity to be used for heat, light, or motive power, or water for domestic or power purposes, telegraph, cable, and telephone companies.

Sec. 20. Each such company, except as provided in section nineteen, shall pay a tax annually to the state upon the net income for its fiscal or calendar year next preceding, as hereinafter provided, upon which income such company is required to pay a tax to the United States. Such company subject to the tax imposed under

part four shall render to the tax commissioner, on or before the first day of April of each year, under oath or affirmation of its president, vice-president, or other principal officer, and of its treasurer or assistant treasurer, a true copy of the last return made to the collector of internal revenue, of the annual net income arising or accruing from all sources in its fiscal or the calendar year next preceding, stating:

(1) The name and location of the principal place of business of such company, the state under the laws of which organized, and the date thereof; the kind of business transacted and a list of all subsidiary companies, if any, with the location of the principal place of business of each; (2) the amount of its paid-up capital stock outstanding, or if no capital stock, its capital employed in business, at the close of the year; (3) the total amount of its bonded and other indebtedness at the close of the year; (4) the gross amount of its income, received during such year from all sources, and, if organized under the laws of a foreign country, the gross amount of its income received within the year from business transacted and capital invested within the United States; (5) the amount of its ordinary and necessary expenses paid out of earnings in the maintenance and operation of the business and properties of such company, stating separately all rentals or other payments required to be made as a condition to the continued use or possession of property, and, if organized under the laws of a foreign country, the amount so paid in the maintenance and operation of its business within the United States; (6) the amount of losses sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property; (7) the amount of interest accrued and paid within the year on its bonded or other indebtedness not exceeding one-half of the sum of its interest-bearing indebtedness and its paid-up capital stock, outstanding at the close of the year, or if no capital stock, the amount of interest paid within the year on an amount of indebtedness not exceeding the amount of capital employed in the business at the close of the year, or in case of a company organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded or other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, or if no capital stock the amount of capital employed in the business at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States bears to the gross amount of its income derived from all sources within and without the United States; (8) the amount paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, and, separately, the amount so paid by it for taxes imposed by the government of any foreign country; (9) the net income of such company after making the deductions authorized; (10) the amount of taxes paid upon its income to the internal revenue department for the year next preceding the one for which such return is made; (11) in case of a company which car-

ries on business outside the State, the fair cash value of its real estate and tangible personal property in each town in this state, and the fair cash value of its real estate and tangible personal property located outside this state; (12) in case of a company deriving profits principally from the holding or sale of intangible property the gross receipts from its business within and without this state and the gross receipts from its business within this state.

Sec. 21. If the amount of the annual net income as returned by each such company to the collector of internal revenue is changed or corrected by the commissioner of internal revenue or by other official of the United States, such company, within ten days after receipt of notification of such change or correction, shall make return under oath or affirmation to the tax commissioner of such changed or corrected net income upon which the tax is required to be paid to the United States. If any deduction is made from

7 the net income as returned, the comptroller shall draw his order in favor of such company on the treasurer, on the voucher of the tax commissioner for the amount of any tax paid upon such deduction, or if any addition is made, such company shall, within thirty days after receipt of notice from the tax commissioner of the amount of such addition, pay the tax thereon.

Sec. 22. If such company carries on business outside of this state, a portion of the net income on which the tax is imposed by the United States shall be apportioned to this state as follows: In case of a company deriving profits principally from the ownership, sale, or rental of real estate, and in case of a company deriving profits principally from the sale or use of tangible personal property, such proportion as the fair cash value of its real estate and tangible personal property in this state on the date of the close of the fiscal year of such company in the year next preceding is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deduction on account of any incumbrance thereon; in case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its gross receipts in this state for the year ended on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the state.

Sec. 23. The tax commissioner, on or before the first day of July in each year, shall make a list of companies subject to the tax upon their net incomes, with the amount of such net incomes taxable in this state, determined as aforesaid, and a tax is hereby laid on each such company of two per centum of such net income, and the tax commissioner shall enter the amount of such tax against the

8 name of each such company. He shall certify to the correctness of such list and said amounts, and deliver a copy thereof to the treasurer, who shall collect such tax in the manner and with the powers provided in the general statutes for the collection of taxes in towns. The tax commissioner shall forthwith mail a statement of the amount of such tax to each such company, but failure to receive such statement shall not excuse nonpayment of such tax. Such tax

shall be payable on or before the first day of August in such year, and to any sum or sums due and unpaid after the first day of August in any year, after ten days' notice and demand thereof by the treasurer, shall be added the sum of five per centum on the amount of any tax unpaid, and interest at the rate of three-fourths of one per centum per month upon such tax from the time the same became due, provided, in case of failure to make such return, or in case of false or fraudulent return, the tax commissioner, upon discovery thereof at any time within three years after the same is due, shall make a return of such taxable net income, and the tax thereon shall be paid by such company upon notification of the amount thereof. Such tax, if unpaid, shall constitute a lien upon the real estate of such company within this State, such lien to be in force from the filing of a certificate, signed by the treasurer, in the land records of the town wherein such real estate is situated until such tax and interest is paid.

7. Acting under protest and in order to prevent the imposition of the penalty and without waiving the right to claim that no tax was due or collectible from it by the State of Connecticut and that the operation of the Statute providing for such a return and tax is in violation of the provisions of the Constitution of the United States in that it constitutes a tax and burden upon interstate commerce contrary to Section 8 of Article 1, and upon the income of business and sales made outside the state of Connecticut and property existing outside of Connecticut contrary to the 14th Amendment, this plaintiff made and filed with the Tax Commissioner of the State of Connecticut a return of its net income upon which it is required to pay a tax to the United States in accordance with the requirements of Section 20 of said Chapter 292 of the Public Acts of 1915.

8. That thereafter and prior to the 1st day of July 1916, the Tax Commissioner of the State of Connecticut presuming to act under and pursuant to the provisions of Sections 22 and 23 of said Chapter 292 of the Public Acts of 1915 above mentioned, apportioned the sum of \$629,668.50 of the applicant's net income on which the tax is imposed by the United States for the year ending December 31st, 1915, as the portion of its income for that year upon which this applicant should be required to pay a tax of 2% to the State of Connecticut, and thereupon said Tax Commissioner assessed against this applicant a tax upon said income of \$629,668.50 of 2% thereof amounting to \$12,593.37.

9. That on or about July 29th 1916 this applicant paid to the Treasurer of the State of Connecticut, the said sum of \$12,593.37, being the amount of such tax determined by the Tax Commissioner as aforesaid, under protest, in order to escape irreparable injury through the enforcement of the penalties and coercive features of the Act. In making such payment the applicant filed with the State Treasurer a written protest setting forth its grounds for such protest, a copy of which will be filed herewith and marked "Exhibit A."

10. That the said sum of \$629,668.50, being the portion of the applicant's net income from all sources for the year ending December 31, 1915, apportioned to the State of Connecticut by said Tax Commissioner is in excess of 47% of the total income earned and received by this applicant from all sources during the said year, and the greater portion of said sum of \$629,668.50 was actually earned and received by the applicant without the State of Connecticut, and was earned and received by it in conducting its interstate commerce, and much of said sum accrued to this applicant from investments made and property and assets held and permanently located without the State of Connecticut, and work, labor and services performed and materials furnished without the said State of Connecticut, and as a matter of fact out of the said sum of \$629,668.50, not over \$40,160.27 thereof was earned or received in the intrastate or domestic business carried on by the applicant in the State of Connecticut.

11. This action is brought within two months after the time provided for the payment of such tax, to wit: August 1st, 1916, being in the nature of an application to this Honorable Court for relief against the action of the Tax Commissioner of said state.

12. As the grounds for such application for relief the applicant alleges:

11 “(1) That no tax is due or collectible from this corporation.

(2) That the portion of the statute providing for such a return and tax, and assessment and apportionment thereof is in violation of the provisions of the Constitution of the United States in that it constitutes a tax and burden upon Interstate Commerce contrary to Sec. 8 of Article 1, and upon the income of business and sales made outside of the State of Connecticut and upon property located without the State of Connecticut, contrary to the 14th amendment.

(3) That though a tax may be due or collectible, the amount assessed upon this corporation thereunder is consequently excessive and is based upon the income of the corporation from its entire business and sales within the United States including income on its business within the State of Connecticut.

(4) That the portion of the statute providing a disclosure from this corporation to the officials of the State of the report made to the Federal Government, on which an income tax is assessed by such government, is in violation of Section 2, Article VI, of the Constitution of the United States and contrary to the 4th, 5th and 14th Amendments thereto.”

The plaintiff claims:

1. A judgment that in so far as said Act attempts to tax this applicant it is in violation of the Constitution of the United States for the reasons above set forth, and therefore is void.

2. A judgment or order directing the Treasurer of the State of Connecticut to repay to this applicant the amount of the tax paid by it aforesaid, to wit: \$12,593.37 with interest.

12 3. Such other and appropriate relief as to equity may appertain.

Arthur L. Shipman is recognized in a sufficient sum to prosecute, etc.

Of this writ with your doings thereon make due return.

Dated at Hartford this 26th day of September, 1916.

CHARLES WELLES GROSS,

Commissioner of the Superior Court for Hartford County.

STATE OF CONNECTICUT,

County of Hartford, ss:

Hartford, Conn., September 27, 1916.

Then and there by virtue hereof I left a true and attested copy of this summons, complaint and exhibit thereto annexed with my endorsement thereon with and in the hands of B. Frank Marsh, Deputy State Treasurer, at State Treasurer's office in the Capitol, of the State of Connecticut, in the said town of Hartford. Said Fred S. Chamberlain, Treasurer, being absent from said State.

Attest:

CHARLES H. LATHAM,

Deputy Sheriff.

Copy	3.00
Endorsements24
Service12
Travel40

\$3.76

Writ returned Oct. 30, 1916.

LUCIUS P. FULLER,

Assistant Clerk.

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"EXHIBIT A."

New York, July 28th, 1916.

To the Treasurer of the State of Connecticut:

The undersigned, The Underwood Typewriter Company, herewith hands you check for \$12,593.37, being the amount of tax on said corporation as determined by the Tax Commissioner of the State of Connecticut upon the amount of its net income taxable in the State of Connecticut under Part 4 of an Act known as Chapter 292 of the Laws of 1915 of the State of Connecticut.

This is to notify you that this tax is paid into the State Treasury not willingly, but under protest, in order to escape thereby irrepar-

able injury through the enforcement of the penalties and coercive features of the Act, and in order to prevent, through the application of Section 23 of said law, the filing of a lien upon the real estate of the undersigned corporation within this State.

And for grounds of said protest, the undersigned corporation hereby states:

1. Part 4 of Chapter 292 of the Laws of 1915 in respect to this corporation is void as offending the constitution of the United States both (a) in taxing or attempting to tax by a State the instrumentalities, gains and profits of a corporation engaged in and derived from the business of interstate commerce; (b) in violating the equal protection clause of the Fourteenth Amendment to said Constitution.

2. The undersigned corporation further protests against said tax so laid under the provisions of said Act, and especially alleges as such ground of protest the inequality, inaccuracy and injustice of the determination by the Tax Commissioner of the State of Connecticut of the fair cash value of its real estate and tangible personal property in the State of Connecticut on the date of the close of the fiscal year of such corporation in the year last preceding, and the fair cash value of its entire real estate and tangible personal property then owned by it, and wherever situated.

UNDERWOOD TYPEWRITER COMPANY.
CLINTON L. ROSSITER,

Vice-President.

(Endorsements.)

No. 18765. Superior Court, October Term, 1916. First Tuesday in November, 1916. The Underwood Typewriter Company vs. Frederick S. Chamberlain, Treasurer. Gross, Hyde & Shipman, Attorney-.

Judgment for defendant pursuant to advice of Supreme Court of Errors Oct. 10, 1919.

Judg't for defendant July 6, 1917, upon demurrer sustained.
Recorded Vol. 54, Page 399.

(Duplicate Docket Entries Endorsed on File.)

Demurrer to claims for relief filed Dec. 21, 1916.

J. E. Cooper appears for defendant Feb. 1, 1917.

Demurrer sustained June 18, 1917.

Plaintiff's Notice of Appeal filed July 7, 1917.

Plaintiff's Appeal to Supreme Court of Errors filed July 7, 1917.
Supreme Court opinion finding error, reversing judgment and directing Superior to overrule defendant's demurrer to claims for relief filed Dec. 26, 1917.

Answer filed by consent Feb. 14, 1919.

Demurrer to claims for relief overruled by the court pursuant to direction of Supreme Court of Errors Feby. 21, 1919.
Agreed finding of facts and stipulation for reservation filed Feb. 1, 1919.

Cause reserved for advice of Supreme Court of Errors Feb. 21, 1919.

5 Supreme Court opinion advising judgment for defendant filed July 19, 1919.

Stipulation *de* additional taxes filed Oct. 27, 1919.

Dissenting opinion of Justice Wheeler filed Nov. 24, 1919.

Copy of petition for writ of error to U. S. Supreme Court filed Dec. 17, 1919.

Copy of assignment of errors filed Dec. 17, 1919.

Copy of writ of error filed Dec. 17, 1919.

Original bond filed Dec. 17, 1919.

Superior Court, Hartford County, December 19, 1916.

THE UNDERWOOD TYPEWRITER COMPANY

VS.

FREDERICK S. CHAMBERLAIN, State Treasurer.

Demurrer to Applicant's Claim of Relief No. 1.

The defendant, Frederick S. Chamberlain, State Treasurer, demurs to the applicant's demand for relief No. 1 in its complaint and application, because upon the allegations of said application no judgment that the act therein mentioned (Chapter 292 Public Acts of 1915) is unconstitutional can properly be demanded for the following reasons.

(1) It appears from said application that the applicant brings its application under and by virtue of the provisions of Sections 27 and 28 of said act, and that said applicant has voluntarily paid the tax provided by and determined under said act, but, notwithstanding, claims that an integral part of the same act is unconstitutional.

(2) The applicant having voluntarily paid said tax cannot recover the same if the act be declared unconstitutional, and a judgment that said act is unconstitutional would defeat the right of the applicant to bring this application and the relief asked for in said demand numbered 1.

(3) It appears that said application is brought under sections 27 and 28 of said act, and the purpose and scope of an application brought under said sections relates solely to the amount of the tax laid against the applicant, and the only relief provided thereunder is a change in the amount of the tax if found excessive and a repayment of the amount of such excess, so that a determination that said act is unconstitutional, and the entire tax

against the applicant void, is not appropriate to this proceeding, and cannot properly be claimed thereunder.

(4) By paying said tax voluntarily, and invoking the provisions of Sections 27 and 28 of said act by bringing an application thereunder, the applicant is precluded from claiming therein that said act is unconstitutional, and is limited and confined to the procedure designated and provided for in said sections 27 and 28.

(5) If the tax against the applicant was void on constitutional grounds as claimed in said application and demand for relief, it nevertheless appears that payment thereof was voluntarily made, and therefore that said tax cannot be recovered, nor can a judgment that said act is unconstitutional affect the merits of this application, or the relief which the court could grant under said judgment.

(6) Because the applicant, having brought this application under said sections 27 and 28, is limited to the procedure and issues which said section authorizes the applicant to follow and to raise in such an application, and is likewise limited to the relief provided for in said sections.

17

Demurrer to Claims of Relief Nos. 2 and 3.

And the defendant, Frederick S. Chamberlain, State Treasurer, further demurs to the applicant's demand for relief Nos. 2 and 3, because on the allegations of said application the relief therein claimed and demanded is not proper, because it appears in said application that the same is brought under Sections 27 and 28 of said Chapter 292 of the Public Acts of 1915, and if the applicant is entitled to any relief upon said application, it is entitled only to the relief provided for by said sections 27 and 28, and is not entitled to claim the relief asked for in said demands Nos. 2 and 3.

The Defendant, FREDERICK S. CHAMBERLAIN,

State Treasurer.

By GEORGE E. HINMAN,

Attorney-General;

JAMES E. COOPER,

His Attorneys.

(Endorsements.)

Original. 18765. The Underwood Typewriter Co. vs. Frederick S. Chamberlain, State Treasurer. Superior Court, Hartford County. Demurrer to Applicant's Claims of Relief.

Filing of the within pleading is hereby consented to and receipt of a duplicate acknowledged.

GROSS, HYDE & SHIPMAN,

Attorneys for Plaintiff.

18

Filed Dec. 21, 1916. Geo. A. Conant, Clerk.

This demurrer is sustained on the grounds stated therein.

BURPEE, J.

June 18th, 1917.

Overruled by the court pursuant to direction of the Supreme Court of Errors Feby. 21, 1919.

GEO. A. CONANT,

Clerk.

Notice to Enter Appearance.

Superior Court, Hartford County.

UNDERWOOD TYPEWRITER CO.

VS.

F. S. CHAMBERLAIN, State Treas.

To George A. Conant, Clerk:

Please enter my appearance for the defendant in the above entitled cause, returnable on the first Tuesday of — 191—. Dated at New Britain this 31 day of Jany., 1917.

JAMES E. COOPER,

Attorney.

(Endorsements.)

No. 18765. Underwood Typewriter Co. vs. F. S. Chamberlain, Treas. J. E. Cooper. Appearance for Defendant. Filed Feb. 1, 1917. Lucius P. Fuller, Assistant Clerk.

19 Superior Court, Hartford County, July 6th, 1917.

Hon. Edwin B. Gager, Judge.

No. 18765.

UNDERWOOD TYPEWRITER COMPANY, a Corporation Duly Organized under the Laws of the State of Delaware and located in the City of Wilmington, in said State of Delaware.

VS.

FREDERICK S. CHAMBERLAIN, of the Town of New Britain, Treasurer of the State of Connecticut.

Judgment.

This action, by writ dated the 26th day of September, 1916, and complaint claiming judgment that Chapter 292 of the Public Acts of 1915 in so far as it attempts to tax the plaintiff in this action is in violation of the Constitution of the United States and void, and

that the Treasurer of the State of Connecticut should repay to this applicant the amount of the tax paid by it in July, 1916, to wit: \$12,593.37, with interest at the rate of six per cent (6%) per annum and such other and appropriate relief as to equity may appertain, came to this Court on the first Tuesday of October, 1916, and thence to the present time when the parties appeared and were at issue on demurrer to the complaint as on file.

The Court having heard the parties finds the issues for the defendant and that said complaint is insufficient.

Whereupon it is adjudged that the defendant recover of the plaintiff his costs taxed at — Dollars and — Cents.

By the Court.

GEORGE A. CONANT,

Clerk.

20 Supreme Court of Errors upon plaintiff's appeal finds error in the foregoing judgment, reverses the same, and directs the Superior — to overrule the Defendant's demurrer to the claims for relief Dec. 15, 1918.

(Endorsements.)

18765. Hon. Edwin B. Gager, Judge. Superior Court, Hartford County. Underwood Typewriter Co. vs. Frederick S. Chamberlain, State Treasurer. Judgment. Recorded Vol. 54, Page 399.

Superior Court, Hartford County, July 7th, 1917.

UNDERWOOD TYPEWRITER COMPANY, a Corporation Duly Organized under the Laws of the State of Delaware and Located in the City of Wilmington, in said State of Delaware,

vs.

FREDERICK S. CHAMBERLAIN, of the Town of New Britain, Treasurer of the State of Connecticut.

Notice of Appeal.

In the above entitled action the plaintiff, Underwood Typewriter Company, hereby gives notice that it appeals from the judgment in said action to the Supreme Court of Errors for the First Judicial District.

UNDERWOOD TYPEWRITER COMPANY,

Plaintiff.

By GROSS HYDE & SHIPMAN,

Its Attorneys.

Superior Court, Hartford County. 18765. Underwood Typewriter Co. vs. Frederick S. Chamberlain, State Treasurer. Notice of Appeal. Filed July 7, 1917. Geo. A. Conant, Clerk.

Superior Court, Hartford County, July 7th, 1917.

UNDERWOOD TYPEWRITER COMPANY, a Corporation Duly Organized under the Laws of the State of Delaware and Located in the City of Wilmington, in said State of Delaware.

vs.

FREDERICK S. CHAMBERLAIN, of the Town of New Britain, Treasurer of the State of Connecticut.

Plaintiff's Appeal.

In the above entitled action the plaintiff appeals from the judgment of said Court to the Supreme Court of Errors for a revision of the errors which it claims to have occurred in the trial thereof; and for reasons of said appeal assigns the following:

1. The Court erred in sustaining the demurrer of the defendant, dated December 19th, 1916, to the applicant's or plaintiff's claims for relief.

It therefore prays for such relief as is provided by law in the premises.

UNDERWOOD TYPEWRITER COMPANY.
By GROSS, HYDE & SHIPMAN.

Its Attorneys.

22 I certify that the foregoing appeal was filed on the 7th day of July, A. D. 1917, and Charles Welles Gross of Hartford is recognized in the sum of One Hundred Dollars (\$100) conditioned that said Underwood Typewriter Company shall prosecute said appeal to effect and pay all costs therein if it shall fail to do so; and said appeal is hereby allowed.

GEORGE A. CONANT.

Clerk.

(Endorsements.)

Superior Court, Hartford County. 18765. Underwood Typewriter Co. vs. Frederick S. Chamberlain, State Treasurer. Plaintiff's Appeal.

Supreme Court of Errors, First Judicial District, Hartford, October Term, 1917.

THE UNDERWOOD TYPEWRITER COMPANY

vs.

FREDERICK S. CHAMBERLAIN, Treasurer.

Action to compel the repayment of a tax, brought to and tried upon demurrer to claims of relief by the Superior Court for Hart-

ford County; demurrer sustained, Burpee, J., and plaintiff failing to plead over the Court, Gager J., rendered judgment for the defendant and the plaintiff appeals.

Error.

Arthur L. Shipman and Eugene D. Boyer of New York City for the appellant (plaintiff).

23 George E. Hinman, Attorney General, James E. Cooper and Charles W. Cramer for the appellee (defendant).

WHEELER, J.:

The single ground of the appeal is the alleged error in sustaining the demurrer to the claims of relief. The complaint alleges that the plaintiff is a corporation organized under the laws of Delaware and engaged in manufacturing and in the sale and rental of its products and merchandise in Connecticut, but that the greater part of its business in Connecticut is in the performance of its agreements for sale and leases made in other states and foreign countries: that by far the larger part of its capital and assets are invested and located outside this state and used for its interstate commerce business: that the greater portion of its earnings and income is derived from such interstate commerce and is received, held and possessed outside this state.

It further alleges: that Chapter 292 of the Public Acts of 1915 provides that each company carrying on business in this state shall "pay a tax annually to the state upon the net income for its fiscal or calendar year next preceding * * * upon which income such company is required to pay a tax to the United States"; that in the case of a company carrying on business outside the state and deriving profits principally from the sale or use of tangible personal property such proportion of the net income shall be apportioned to this state "as the fair cash value of its real estate and tangible personal property in this state on the date of the close of the fiscal year of such company in the year next preceding is to the fair cash value of its entire real estate and tangible personal property then owned by it."

24 That Section 23 imposes upon the tax commissioner the duty of determining the tax laid on each company and of mailing a statement of such tax to each company: and it provides that the tax shall be payable on or before the first day of August in each year and if unpaid after the first day of August, after ten days' notice and demand by the treasurer, there shall be added 5% to the amount of the tax and interest at the rate of $\frac{3}{4}$ of one per centum per month upon such tax, and "Such tax, if unpaid shall constitute a lien upon the real estate of such company in this state and be in force from the filing of a certificate in the land records."

That the tax commissioner prior to July 1, 1916, acting under this Act apportioned the sum of \$629,668.50, of the applicant's net income on which the tax was imposed by the United States for the year ending December 31, 1915, as the portion of its income

for that year upon which it should pay to the state such tax and thereupon assessed against this applicant 2% of such income amounting to \$12,593.37.

Acting under protest the plaintiff in order to prevent the imposition of the penalty of the Act and without waiving its right to claim that no such tax was due or collectible from it by the state and that the requirement for such return was unconstitutional, made and filed such return and on July 29, 1916, paid said tax under protest and to prevent irreparable injury through the enforcement of the penalties and coercive features of the Act.

The complaint further alleges that the sum determined as the net income upon which this tax is computed is in excess of 25 47% of the total income earned and received by the plaintiff, and the greater portion was earned and received without the state and in conducting its interstate business, and not over \$40,160.27 thereof was earned or received in its business carried on in Connecticut.

Upon these facts the plaintiff claimed relief by way of a judgment (1) that the Act in so far as it attempts to tax the plaintiff is in violation of the United States Constitution and void, (2) directing the Treasurer of Connecticut to repay to it the amount of such tax with interest.

The plaintiff demurred to the claims of relief principally upon three grounds:

1. Sections 27 and 28 of the Act under which the plaintiff's action was brought do not give the court jurisdiction.
2. The plaintiff cannot seek the remedy provided by the Act whose validity it assails.
3. The plaintiff upon the facts paid the tax voluntarily and hence cannot claim the Act to be unconstitutional.

The plaintiff says in its brief that, "The ultimate question in the case is whether or not Part 4 of Chapter 292 of the Public Acts of 1915, is constitutional, or does invade the exclusive power of the Federal Congress over interstate commerce, or violate the 4th, 5th and 14th Amendments to the Constitution."

The demurrer does not raise this question but limits its contentions to an attack upon the right of the plaintiff to maintain its appeal because of its own conduct in paying the tax and of the limited scope of the remedy provided by the Act upon which 26 the plaintiff predicates its action.

1. If the plaintiff with full knowledge of the facts paid this tax voluntarily he cannot recover it, even though the tax were invalid and paid under protest.

Sheldon v. South School District, 24 Conn. 88, 91.

The tax in question was paid "under protest in order to escape irreparable injury through the enforcement of the penalties and coercive features of the Act", the complaint alleges. The admissions of the demurrer go no further than the terms of the Act.

The tax would become due under the Act on or before August 1st. Ten days thereafter and upon notice and demand of payment by the treasurer, five per centum of the unpaid tax would automatically be added to it and interest at the rate of three-fourths of one per centum per month upon such tax from the date the tax became due would be added.

Further, the unpaid tax became a lien upon the real estate of the company within the state from the time the tax became due and was unpaid and from the filing of a certificate signed by the treasurer in the land records of the town.

Since the filing of the certificate might be contemporaneous with the date when the tax became due and unpaid, the company was in danger of having this lien placed upon its property from such date.

The company was confronted with this situation. Though it contested the validity of the tax successfully it could not prevent the filing of the lien upon its property. And if it were unsuccessful, no

matter what merit its claims possessed the lien would attach, 27 and the five per centum penalty and the nine per centum interest would accrue. The lien might prove a serious burden upon its credit, while the actual pecuniary losses suffered or threatened involved a hardship and loss which no company should be compelled to face. It could not measure the extent of these penalties, because it could not know the time the tax litigation would take. It would be unfair to it to compel it to take this risk of loss as the condition of its right to test the validity of the tax. It should have that right without condition, and by a clear and certain remedy.

This is common practice and it is sound public policy. It is not to the advantage of the state that those whom it seeks to tax should refuse to pay their taxes in order to test their validity. Such a course if largely followed might cause the state more than an inconvenience in the disturbance of the budget upon which the payment of its governmental obligations depended. The more orderly course is a compliance with the law by a payment, reserving the right to contest the validity of the required payment.

The payment of the tax in question was not a voluntary one, it was in the contemplation of the law a payment under duress of the penalties of the Act.

And this we hold from a consideration of the provisions of the Act and without consideration of any remedies by way of distress which the state might have for the enforcement of payment of this tax.

A payment of a tax made to avoid the onerous penalties of the Act imposing the tax for its non-payment is not a voluntary payment.

The more modern doctrine supports this view.

28 Robertson v. Frank Bros. Co., 132 U. S. 17.

Atchison T. & S. F. Ry. Co. vs. O'Connor, 223 U. S. 280, 285.

We reached practically the same conclusion in Seeley v. Town of Westport, 47 Conn. 294, 299, on a petition to restrain a town and its officers against a levy upon real estate. We said "We think there-

fore that the law is so that a man may protect his land from a sale, or prevent a cloud upon his title, by paying the tax and have his remedy to recover it back if the tax was illegal and unjust."

It was not necessary for the plaintiff to wait until demand was made by the treasurer, the tax was due August 1st, it was paid July 29th, and the lien might have been made effective on August 1st. The compulsion of the law began when the tax was due and it would have served no purpose to have permitted the defendant to have made demand, or to have been about to file the lien before paying the tax. The plaintiff pursued the orderly course, it paid under protest and upon pressure of the law's duress.

2. Another ground of demurrer is that the plaintiff cannot attack the constitutionality of an Act whose remedy it seeks. And also, that if one part of an Act is void all parts are void except such as are wholly separable.

This latter principle is sound.

Lewis' Sutherland Statutory Construction, 2d Ed. 297.

It has no present application. The remedies provided by Sections 27 and 28 are entirely independent of the body of the Act.

No reason has been presented and we think of none, why
29 the remedy provided by the Act may not stand even though some other part of the Act fall.

3. Finally the demurrer asserts that the purpose and scope of the remedy provided by Sections 27 and 28 of the Act are administrative and relate to a correction in the amount of the tax, and the repayment of the excess, and not to a determination of the validity of the tax.

And the State Treasurer contends that the Court has no power under these sections other than to determine whether the law has been complied with in determining the amount of the tax.

Section 27 provides, "Any company aggrieved because of the tax laid * * * may apply to the Superior Court * * * for relief; and said Court shall fix a time and place where such corporation may show cause why such tax should be changed."

This is the usual language of our statutory appeals except that instead of "may appeal" we have "may apply to the Superior Court for relief."

The court which is to hear the cause and grant relief is one of general jurisdiction, and the language of the Act does not, at least expressly, attempt to restrict its jurisdiction.

The corporation is granted, upon the appeal the right to apply for relief and this must mean, either for legal or equitable relief. It is also accorded the right to show cause why such tax should be changed. This must mean a legal cause, not a cause outside the jurisdiction.

Our statutes furnish instances where appeals are given in
30 the language used in Section 27.

G. S. §§ 2354, 4747, 2048, 2056, 4772 and 2627.

"Appeal", and "apply for relief" or "application for relief", are obviously used in the statutes in the same sense and for the same purpose.

In *Hall v. City of Meriden*, 48 Conn. 416, we construed a provision in the Charter of Meriden which provided for an application for relief to the Superior Court by any person aggrieved by an appraisal of damage or assessment of benefits.

The plaintiff claimed that the Court had no power to reduce the damages awarded, that it could only raise them, or leave them as they were. The plaintiff supported his claim by contending that the application for relief granted differed from an appeal from such assessments.

The court through Judge Loomis said, "Now, it cannot be that the legislature intended a totally different rule of procedure in the two cases where the proceeding is called 'an application for relief', from that which is to be followed in the others. It is in every case in effect an appeal from a lower tribunal to a higher one, and must have the ordinary incident of an appeal."

This decision is decisive.

Sections 27 and 28 were intended to give the taxpayer an adequate remedy at law otherwise the taxpayer would be left to his remedy by injunction and if exercised this would prevent the collection of the funds required to administer the state government, and if the taxpayer should not succeed he would subject himself to the penalties of the Act accruing during the pendency of the action.

31 The remedy given by these sections gave the taxpayer a review of the entire proceedings de novo in court, and he by paying the tax under protest protected himself from the penalties of the Act and at the same time conserved the state treasury.

The relief afforded by these sections is not confined to a mathematical calculation, to the correction or change in the amount of the tax. It contemplates a determination of whether the tax in whole or part is unjust or illegal. That may require a finding of the exact amount of the tax but its primary purpose is to find out if any part of the tax is unjust or illegal. Such a finding is the exercise of a judicial function, while a mere mathematical calculation would be an administrative act.

It is not to be presumed that the General Assembly intended to impose upon the Superior Court administrative functions. And a fair construction of these sections does not lead to this conclusion.

There is error, the judgment is reversed and the Superior Court directed to overrule the defendant's demurrer to claims of relief.

In this opinion the other judges concurred.

The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JAMES P. ANDREWS,

Reporter,

Per W. E. O.

32

(Endorsements.)

18765. The Underwood Typewriter Co. vs. Frederick S. Chamberlain, Treasurer First Judicial District, Hartford. October Term 1917. Wheeler, J. Filed Dec. 26, 1917. George A. Conant, Clerk.

Superior Court, Hartford County, January 18th, 1918.

THE UNDERWOOD TYPEWRITER COMPANY

vs.

FREDERICK S. CHAMBERLAIN, Treasurer.

Answer.

(1) Paragraphs 1 and 2 of plaintiff's complaint are admitted.

(2) So much of paragraph 3 of plaintiff's complaint as alleges that the plaintiff is engaged in the business of manufacturing, buying or otherwise acquiring, selling, renting, repairing, operating, distributing and general trafficking and dealing in writing machines, duplicating machines, mechanical novelties, typewriters of any and every description, typewriter materials, appliances and inventions, and all materials and articles connected with or in any wise relating to the manufacture, sale or use of writing machines, duplicating, adding, calculating and numbering machines and devices and in connection with such business maintains a factory in the City of Hartford, State of Connecticut, is admitted. All the other

33 allegations of said paragraph are denied.

(3) Paragraphs 4 and 5 are denied.

(4) Paragraph 6 is admitted.

(5) Paragraph 7 is admitted.

(6) Paragraph 8 is admitted.

(7) The sum of \$329,638.50 alleged in paragraph 8 of plaintiff's complaint as the portion of applicant's net income upon which the applicant should be required to pay a tax to the State of Connecticut and upon which said tax commissioner assessed a tax, is that proportion of the applicant's net income which the fair value of its real estate and tangible personal property in the State of Connecticut on the date of the close of the fiscal year of the applicant in the year next preceding as set forth in its return filed as alleged in paragraph 7 of the complaint is to the fair cash value of its entire real estate and tangible personal property then owned by it as set forth in said return.

(9) So much of paragraph 9 as alleges that on or about July 29th, 1916, the applicant paid to the treasurer of the State of Connecticut the sum of \$12,593.37 being the amount of said tax determined by the tax commissioner, as aforesaid, under protest and in

making such payment the applicant filed with the State Treasurer the written protest marked "Exhibit A" is admitted. The other allegations of said paragraph are denied.

(10) Paragraph 10 is denied.

(11) Paragraph 11 is admitted.

(12) Paragraph 12 is denied.

FREDERICK S. CHAMBERLAIN,

Treasurer.

By GEORGE E. HINMAN,

Attorney-General.

34

And by J. E. COOPER,

His Attorneys.

(Endorsements.)

18765. The Underwood Typewriter Company vs. Frederick S. Chamberlain, Treasurer. Superior Court, Hartford County, January 18th, 1918. Answer. Consent to filing duplicate received. Jan. 29, 1919. Gross Hyde & Shipman, for Plaintiffs. Filed Feb. 13, 1919. Lucius P. Fuller, Assistant Clerk.

Supreme Court of Errors, First Judicial District.

THE UNDERWOOD TYPEWRITER COMPANY

VS.

FREDERICK S. CHAMBERLAIN, Treas.

Agreed Finding of Facts.

1. The plaintiff was on January 1st, 1915, and ever since has been a corporation duly organized under the laws of the State of Delaware, having its principal office in the City of Wilmington within said State and its main office for the transaction of its commercial business in the city of New York and state of New York.

2. The business of the plaintiff was on January 1st, 1915, and ever since has been that of manufacturing, buying or otherwise acquiring, selling, renting, repairing, operating, distributing
35 and generally trafficking and dealing in writing machines, duplicating machines, mechanical novelties, typewriters of any and every description, typewriter materials, appliances and inventions and all materials and articles connected with or in any wise relating to the manufacture, sale or use of writing machines, duplicating, adding, calculating and numbering machines and devices.

3. A general description of the method of doing business by the Underwood Typewriter Company as conducted on January 1, 1915, and ever since that date, is as follows:

(a) It maintains its sole manufacturing plant in the City of Hartford, State of Connecticut, although it maintains small establishments for the repair of typewriters at its branch offices or agencies, which are located all over the United States and in foreign countries.

(b) It maintains branch offices and show rooms in every state within the United States and in many foreign countries, which branch offices and show rooms are conducted in the name of the plaintiff or the name of its subsidiary corporations bearing the same name, all the stock of which is owned by the plaintiff and which subsidiary corporations act as selling agents or factors for the plaintiff. It employs branch managers and salesmen who solicit orders for the sale and rental of typewriters and other products in the cities and town where such branch offices and show rooms are located and in the vicinity thereof, from persons, partnerships and corporations residing or doing business in such cities, towns and localities. Such orders for the sale and rental of typewriters and other products so obtained are forwarded to the plaintiff's main office

36 in the City of New York for approval and fulfillment. Thereupon the plaintiff's officials at its main office in said City of New York, direct its factory managers in Hartford to ship such typewriters and other products direct to the various branch offices for the purpose of making delivery to the purchasers and lessees thereof. The aforesaid managers of the Hartford factory, in compliance with said instructions, ship said typewriters and other products manufactured by the plaintiff through common carriers and similar means of communication, to such various branch offices and show rooms located in such other states and foreign countries to enable such branch offices to deliver such products to the plaintiff's customers and lessees. Such branch managers thereupon deliver to the purchasers and lessees such machines and products; collect the purchase price and rent for the same when due, and deposit such moneys in the name of the plaintiff in a bank located in the city or town in which such branch offices and show rooms are located, in the said various states of the United States and foreign countries. The moneys so deposited in said banks in said various states and foreign countries may only be drawn out or paid out upon the check or draft signed by the treasurer of the plaintiff, whose main office is located in the city of New York. Shipments from the Hartford factory are also made direct to purchasers upon orders from the New York office.

(c) All machines and products which are rented are so rented to the lessees thereof under the terms of written leases between the plaintiff and the lessees executed at the place where such machines and products are delivered to the lessees thereof. The plaintiff also maintains, through its agents and representatives, at
37 such various branch offices, repair shops, where for a consideration paid by the users of the machines and products manufactured by the plaintiff, such machines and products may be repaired.

(d) All operating expenses of such branch offices and show rooms, including office rents and salaries of the various branch managers

and salesmen, are paid by the plaintiff by checks and drafts by the plaintiff upon the various banks located in the various states and foreign countries and signed by the treasurer of the plaintiff at the City of New York.

(e) The plaintiff also sells merchandise consisting of typewriter ribbons, desks, brushes, tools, oil cans, carbon papers and duplicating appliances, all of which it purchases for the purpose of sale, from individuals, copartnerships and corporations disassociated from it and whose business is located outside the State of Connecticut. None of said articles are manufactured by it or within the State of Connecticut.

The gross receipts from the sale of such merchandise accessories are found in detail in subdivision *k* in schedule under paragraph 5 of this finding.

Certain of such merchandise accessories are shipped in connection with typewriters from its factory in Hartford, such as typewriter ribbons, small tools, brushes, wrenches, oil cans, rubber and steel covers and wooden baseboards, and are an integral portion of each typewriter. The gross receipts from the sale of said merchandise accessories when sold in connection with typewriters are included in subdivision A in schedule under paragraph 5 of this finding.

The company also sells adding machines which are manufactured by persons, partnerships and corporations disassociated from the applicant and whose business is located outside of the State of Connecticut. The gross receipts from the sale of such adding machines are found in detail in subdivision *d* in schedule under paragraph 5 of this finding:

None of the merchandise accessories sold by the plaintiff in connection with typewriters is manufactured by the applicant but all such merchandise accessories are purchased from other persons, firms and corporations none of whom sell or manufacture the same in Connecticut, but the same are purchased by the plaintiff outside the state and shipped to its factory in Hartford to be disposed of by it in connection with and as a part of said typewriters in interstate and foreign commerce.

(f) The business of plaintiff in Connecticut consists principally in manufacturing and repairing machines and shipping machines as directed by orders from the office of the plaintiff in New York as hereinbefore stated. Funds to keep up plaintiff's manufacturing plant at Hartford and for its manufacturing purposes are forwarded from plaintiff's New York office to Hartford for disbursement. The plaintiff also maintains in Connecticut certain branch offices in the cities of Hartford and New Haven for the sale or lease of machines in Connecticut. In said cities, such branch offices sell or lease the plaintiff's product to buyers and lessees within the state.

4. A copy of plaintiff's return of net income to the Collector of Internal Revenue of the United States for the year 1915, filed under protest in the office of the Tax Commissioner of

the State of Connecticut on the 29th day of March, 1916, is annexed hereto and made part of this paragraph, marked Exhibit A.

5. During said year the gross receipts and net profits of the applicant from its operations were as follows:

	Sales and rentals outside of Conn.	Sales and rentals within Conn.
Sub-Div. A. Gross receipts from sales of company's products	\$9,424,110.61	\$129,125.41
" " B. Gross receipts from rentals of company's product	428,852.35	6,793.45
" " C. Gross receipts from repairing machines ..	452,409.26	7,301.32
" " D. Sale of adding machines	91,065.80	1,590.00
" " E. Returns from slot machines and sale of parts	191,269.62	98.76
" " F. Rent from real property	None.	44,400.00
" " G. Dividends received ..	8,288.00	None.
" " H. Discounts	14,627.36	None.
" " I. Interest	29,456.00	None.
" " J. Sales of desks, furniture and other accessories	362,448.19	6,006.53
	<u>\$11,002,527.19</u>	<u>\$195,315.47</u>
Net profits from above transactions	1,293,643.95	42,942.18

Its gross and net profits were derived territorially as follows:

Sub-Div. K.

Gross profits from sales of Company's products manufactured in Connecticut and sold outside of Connecticut	\$6,171,983.84
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Sub-Div. L.

Gross profits from rental of Company's products manufactured in Connecticut but rented outside of Connecticut	428,852.35
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Sub-Div. M.

40 Gross profit from repairing machines manufactured in Connecticut, but repaired outside of Connecticut	452,409.26
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Sub-Div. N.

Gross profit from sale of adding machines manufactured in Connecticut by a separate concern but sold outside of Connecticut	30,510.21
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Sub-Div. O.

Rents from slot machines manufactured in Connecticut but located outside of Connecticut	191,294.82
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Sub-Div. P.

Dividends received outside of Connecticut.	8,288.19
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Sub-Div. Q.

Discounts obtained outside of Connecticut.	4,627.36
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Sub-Div. R.

Interest received outside of Connecticut.	29,456.00
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Sub-Div. S.

Sales of desks, furniture and other accessories manufactured by others located outside of Connecticut and sold outside.	159,798.90
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\$7,487,220.93

Sub-Div. T.

Expenses including salaries, rents, commissions, etc., outside of Connecticut.	6,193,576.98
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Net profits from above transactions. \$1,293,643.95

Sub-Div. U.

Gross profits from sales of Company's products manufactured in Connecticut and sold within Connecticut	37,332.56
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Sub-Div. V.

Gross profits from rental of Company's products manufactured in Connecticut but rented within Connecticut	6,793.45
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Sub-Div. W.

Gross profit from repairing machines manufactured in Connecticut but repaired within Connecticut	7,301.32
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Sub-Div. X.

Gross profit from sale of adding machines manufactured in Connecticut by a separate concern but sold in Connecticut.....	675.00
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Sub-Div. Y.

Rents from slot machines manufactured in Connecticut but located in Connecticut.....	73.76
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Sub-Div. Z.

Rent from real property located in Connecticut	44,400.00
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Sub-Div. A-1.

Sales of desks, furniture and other accessories manufactured by others located outside of Connecticut and sold in Connecticut.....	2,749.53
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\$99,326.62

Sub-Div. A-2.

Expenses including salaries, rents, commissions, etc., within Connecticut.....	56,384.44
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Net profit from above transactions.....	\$42,942.18
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41 The term "gross profit" as used in this paragraph means the difference between receipts and manufacturing costs. General administrative expense, including salaries of officers, sales expense, and other like charges, wherever incurred, are not deducted from gross receipts to arrive at gross profits, such items are included in the figure which is deducted from gross profits for the purpose of ascertaining net profits, and all said general administrative expense, sales expense, and other like charges are included in the item of expense incurred outside of Connecticut, set forth in Sub-Division T above.

56 6. The fair cash value of said company's real estate and tangible personal property located within the State of Connecticut on January 1st, 1916, was \$2,977,827.67, and the fair cash value of all the real estate and tangible property located without the State of Connecticut was \$3,343,155.11.

45 7. On the 27th day of March, 1916, the plaintiff made and filed with the Tax Commissioner of Connecticut a return of its net income upon which it was required to pay a tax to the United States and accompanied such return with a certain letter of protest, marked Exhibit B, a copy of said return being hereto annexed, marked Exhibit C.

8. Thereafter and prior to the first day of July, 1916, the Tax Commissioner of the State of Connecticut acting under and pursuant to the provisions of Sections 22 and 23 of Chapter 292 of the Public Acts of 1915, apportioned the sum of \$629,668.50 of the plaintiff's net income on which a tax was imposed by the United States for the year ending December 31st, 1915, said sum being such proportion of the total net income returned as aforesaid as the said fair cash value of its real estate and tangible personal property in this state is to the fair cash value of its said entire real estate and tangible personal property then owned by it, as the portion of its income for that year upon which plaintiff was required to pay a tax of 2% to the State of Connecticut, and thereupon said Tax Commissioner assessed against plaintiff a tax on said income of \$629,668.50 of 2% thereof amounting to \$12,593.37.

9. On or about the 29th day of July, 1916, plaintiff paid to the treasurer of the State of Connecticut the sum of \$12,593.37, being the amount of such tax determined by the Tax Commissioner as aforesaid. In making such payment the applicant filed with the State Treasurer a written protest, setting forth the grounds for such protest, a copy of which is annexed hereto, marked Exhibit D.

10. The Underwood Typewriter Company was assessed by the town and city of Hartford taxes on the assessment list of October 1st, 1915, and paid all taxes so assessed against its property on or about July 1st, 1916, in accordance with Section 2328 of the General Statutes of Connecticut, Revision of 1902, and amendments thereto.

EXHIBIT A.

Income Tax.

Audited by

The Penalty

for failure to have this return in the hands of the Collector of Internal Revenue within the time required by law is not more than \$10,000 and the assessment is increased fifty per cent.

Collection District Assessment List 23-A.
191—
Month
Page—, Line—

43

Important.

Above space to be stamped by Collector, showing district and date filed.

Read this information and instructions carefully and fill in supplementary statement before making entries in return proper. Totals in supplementary statement must agree with totals in return.

Return of Annual Net Income.

(Title I, Parts II and III, of the Act of September 8, 1916.)

Corporations.

(Other than insurance companies.)

Return of Net Income for the calendar year ended December 31,
1915, by Underwood Typewriter Co. of Delaware, Manufacturing,
(name of corporation, joint stock (kind of business)
company or association)
and located at 30 Vesey Street, New York City, New York.
(Street and number) (City or town) (State)

(The address given must be that of the principal place of business
of the corporation.)

If no figures are to be extended opposite any item in the return the
word "None" should be inserted.

1. Total amount of paid-up capital stock outstanding
at the close of the year, or if no capital stock,
the capital, other than interest bearing indebt-
edness, employed in the business at the close of
the year 13,000,000.00

2. Total amount of bonded and other interest-bearing
indebtedness outstanding at close of year, ex-
clusive of indebtedness wholly secured by col-
lateral, the subject of sale or hypothecation in
ordinary business of the corporation 1,806,892.80

3. Gross Income:

	Dollars.	Cts.
(a) From operations	\$7,579,776.	00
(b) From rentals	44,400.	00
(c) From interest	29,456.	00
(d) From dividends received	8,288.	19
(e) From other sources	14,627.	36

Total gross income \$7,676,547.55

Total deductions 6,339,961.42

8. Net Income \$1,336,586.13

9. Tax assessable at 2% None.

10. None.

Total \$1,336,586.13

Deductions:

	Dollars.	Cts.
4. (a) Expenses, general	\$6,018,210.	86
(b) Payments in lieu of rent	None.	
5. (a) Losses sustained charged off	55,513.	85
(b) Depreciation charged off	172,972.	89
(c) Depletion charged off	None.	
6. (a) Interest paid (See Note 6a)	45,083.	17
(b) Interest paid by banks on deposits	None.	
7. (a) Taxes, domestic paid	48,180.	65
(b) Taxes, foreign paid	None.	
Total deductions	\$6,339,931.	42

We, ———, President and ———, Treasurer of the above named company, whose return of net income is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief, true and correct in each and every particular.

President.

Treasurer.

Sworn to and subscribed before me this — day of —, 191—.

[Seal of officer taking affidavit.]

Official capacity.

General Instructions.

Time of Filing Returns.—Returns made on the basis of a calendar year must be filed on or before March 1 with the Collector of Internal Revenue of the district in which is located the principal place of business of the corporation; if made on the basis of a fiscal year they must be filed within 60 days after the close of such year.

Fiscal Year.—Corporations desiring to make returns of annual net income on the basis of a fiscal year other than the calendar year must, not less than 30 days prior to March 1 of the year in which the return would be due if made on the calendar year basis, file with the Collector a notice in writing designating the last day of some month as the close of such fiscal year. A return for that portion of the calendar year ending with the date designated as the close of the fiscal year must be filed on or before the first day of March of the next calendar year, and the return for each full fiscal year thereafter must be filed within 60 days after the closing date of the fiscal year so established.

Extension of Time.—In the case of neglect to file the return within the prescribed time, the Collector is authorized to grant an extension of the filing period not exceeding 30 days from the normal due date, provided such neglect was due to absence or sickness and provided an application for such extension is made in writing prior to the expiration of the period for which extension may be granted. In meritorious cases, the Commissioner is authorized to grant such further extension as he may deem proper.

Signatures and Verification.—Returns must be signed and verified by two officers of the corporation, that is, by the president, vice president, or other principal officer, and the treasurer or other financial officer, and must be sworn to before an officer authorized to administer oaths, and the seal of the attesting officer, if he is required to have a seal, must be impressed on the return in the space provided for that purpose.

Subsidiary Companies.—The corporation making this return should attach hereto a list of all its subsidiary companies, if any, with the location of the principal place of business of each. Each subsidiary company must make a separate and distinct return.

46 Foreign Corporations.—Foreign corporations subject to the law are required to make returns to the Collector of the District in which is located the principal place of business or agency through which is transacted the business in the United States, or if the corporation has no place of business or agency in the United States, its return will be filed with the Collector of Internal Revenue at Baltimore, Maryland. The gross income to be returned is that received from business transacted and capital invested in the United states, including interest on bonds, notes or other interest-bearing obligations of residents, corporate or otherwise, and including income derived from dividends on capital stock or from net earnings of resident corporations, joint-stock companies, or associations whose net income is taxable under this law. The deductions allowable are those losses and disbursements incident and necessary to the transaction of the business in this country, all as specifically set out in the Act. Foreign taxes are not deductible from the gross income arising and accruing to a foreign corporation from business done or capital invested in the United States. In the case of a foreign corporation having no place of business or agency in the United States and no return is made, the tax on income from interest and dividends will be withheld at the source.

Penalties.—Corporations refusing or neglecting to file returns within the time prescribed by law or rendering false or fraudulent returns shall be liable to a penalty of not exceeding \$10,000, and an additional tax of 50 per cent in case of neglect to file the return within the time prescribed by law, and 100 per cent in the case of a false or fraudulent return shall be added to the assessment; providing in 47 case of delinquency, if the return is voluntarily filed without notice from the Collector, and it is shown that delay in filing was due to reasonable cause and not to willful neglect, the 50 per cent additional tax will not be assessed.

Any officer of any corporation required by law to make, render,

sign, or verify any return, who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required to be made shall be guilty of a misdemeanor, and shall be fined not exceeding \$2,000 or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

Supplementary Statement.

The following information must be furnished by every corporation, joint-stock company, or association, without which the returns will not be accepted as complete. The items herein relate to the items listed in the above return form and bear corresponding numbers, and the totals set out in the above return must agree with the totals hereinafter set out.

1. Paid-up Capital Stock.—Unissued or treasury stock should not be included in this item, but only such stock as has been actually issued and is outstanding at the close of the year, for which payment has been received. Where the stock issued is payable in installments or assessments, only so much of it as has been actually paid in upon such installments or assessments should be reported.

If no capital stock is issued or if the capital stock is issued without par value, the amount of capital invested in the business at the close of the year, not including borrowed capital, will be entered under this item.

48 2. Indebtedness.—All interest-bearing indebtedness, for the payment of which the corporation or its property is bound should be reported below. In the case of banking corporations, and like financial institutions, deposits should not be reported as indebtedness. Indebtedness wholly secured by collateral, the subject of sale or hypothecation in the ordinary business of the corporation, should be reported here, but such indebtedness must not be entered under Item 2 above nor be considered in determining the amount of interest deductible under Item 6 (a).

(a) Paid-up "common stock"	\$8,500,000.00
(b) Paid-up "preferred stock"	4,500,000.00

Total paid-up stock	\$13,000,000.00
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or (c) Capital employed in business	
---	--

Character of Obligation.	Principal.
Notes payable	\$900,000.00
Accounts Payable	743,142.80
Dividends declared	163,750.00

Total indebtedness	\$1,806,892.80
--------------------------	----------------

3. Gross Income.—All manufacturing, mercantile, or other corporations which determine their annual gain or loss by inventory are required to state the same in the form indicated below. If the annual income or loss is determined otherwise, the methods employed must be stated in the space provided therefor. In case the annual gain or loss is determined by inventory, merchandise must be inventoried at the cost price, as any loss in salable value will ultimately be reflected in the sales during the year when the goods were disposed of.

(a) From Operations:

Per Inventory—

Sales during year.....	\$11,101,071.30	
Stock on hand at close of year.....	2,686,865.17	
		\$13,787,936.47
49 Purchases during year.....	\$3,837,350.36	
Stock on hand at beginning		
of year	2,370,810.11	
Total	\$6,208,160.47	
*Total gain or loss (3-a first page)		\$7,579,776.00

In the case of manufacturing corporations, "Purchases during the year" will include so much of the cost of goods, finished or unfinished, sold or unsold, as has not been separately deducted under any item of the return.

Overhead charges should not be included in inventory (See Item 4).

If inventory is not used, state below method of determining gain or loss from operations:

In case of the sale of capital assets acquired prior to March 1, 1913, the profit or income to be returned will be the difference between the fair market value of such assets as of March 1, 1913, and the price at which they are sold. If acquired subsequent to March 1, 1913, then the profit or income to be returned is the difference between the cost and the selling price.

In the case of the sale of assets acquired prior to March 1, 1913, state—

- (1) Original costs of assets.....\$.....
- (2) Fair market price or value as of March 1, 1913.
- (3) Price at which assets were sold.....

State how fair market price or value as of March 1, 1913, was determined.

*(If inventory shows loss, make entry in red ink or strike out "gain.")

50 (b) From Rentals: Rentals to be reported as income will include all payments received in cash or its equivalent as rent on buildings or other property owned by the corporation making the return, as well as all royalties received.

(c) From Interest: Interest to be reported as income includes all interest received on bonds or securities owned by the corporation, with the exception of interest on obligations of a State or political subdivision thereof or interest upon the obligations of the United States or its possessions, which latter interest for the purpose of information should be extended below:

U. S., State and Other Obligations.

Name of obligation.	Amount of principal.	Rate.	Amount of interest received.
None			
Total.....	\$.....		\$.....

(d) From Dividends Received: Any distribution made or ordered to be made by a corporation out of its earnings or profits accrued since March 1, 1913, whether in cash or stock of the paying company, must be returned by the receiving corporation as income of the year in which the distribution was made or ordered to be made. Stock dividends must be returned to the amount of their cash value and such cash value is held to be the proportionate share of the surplus accrued to the paying corporation since March 1, 1913, as is represented by the stock distributed or ordered to be distributed to the receiving corporation.

(e) From other Sources: All other sources from which income has been received, and the amount thereof, should be itemized below:

51	Cash discount	\$14,627.36
	Received	
	Total	\$14,627.36

4. Expenses, General: This item should include only the ordinary and necessary expenses paid within the year in the maintenance and operation of the business and properties of the corporation, itemized as per schedule below, and will not include any disbursements the deduction of which is specially provided for in the return form proper on the obverse side of this form.

Interest paid on indebtedness wholly secured by property collateral the subject of sale or hypothecation in the ordinary business of the corporation as a dealer only in the property constituting such collateral or in the loaning of funds thereby produced, is an allowable deduction as a business expense to an amount of the interest paid on such indebtedness not in excess of the actual value of the collateral securing it.

All expenses of material, labor, fuel and other items entering into the cost of goods purchased, sold, or inventoried are deductible under this head as expense, provided such items have not been con-

sidered in determining the cost or purchases during the year when the income derived from operations is ascertained through an inventory as set out in Item 3 (a) of this statement.

Expenditures for incidental repairs which do not add to the value or appreciably prolong the life of property are deductible as expenses, but expenditures for new buildings, permanent improvements or betterments which increase the value of property, or for restoring or replacing property, are not deductible under this or any other item of the return. Such expenditures are properly chargeable to capital account, to be extinguished through annual depreciation allowances.

Payments made to officers or employees who are stockholders, which payments are made in the guise of salaries or compensation and the amount of which is based upon the stockholdings of such officers or employees, are not deductible as a business expense.

(c) 1. Labor, wages, commissions, etc.	\$2,316,472.65
2. Fuel, light, power, etc.	20,559.53
3. Rentals (ordinary)	334,435.18
4. Repairs, ordinary and incidental	None
5. Interest on indebtedness wholly secured by collateral the subject of sale, etc.	None
6. Salaries of officers	44,000.00
7. Other expenditures—Classify—	
(Advtg.	
(General Exp.	3,302,743.50
(Meh. Repairs	
Total expenses	

4. (a) 8. Names of officers and employees to whom salaries of \$3,000 or more were paid during the year and amount paid to each. (If the space below is not adequate, a list marked "Item 4 (a) containing this information should be attached to this form).

Name.	Address.	Amount.
_____	_____	\$ _____
_____	_____	_____
_____	_____	_____
Total		\$ _____

Corporations paying to individuals salaries or rentals in excess of \$3,000 per year are required to withhold the normal tax of 2 per cent (1 per cent for 1916) on the entire amount so paid, unless certificates of exemption are filed, in which case the tax must be withheld on the amount in excess of the exemption claimed. The

tax so withheld must be returned on Form 1042, which, together with all certificates of exemption, must be filed in the Collector's office not later than March 1.

Notwithstanding the withholding of the tax, the individual receiving income from this and all other sources in excess of \$3,000 must also make returns on Form 1040.

(b) Payments in Lieu of Rent: This item should include all royalties and other charges, including any interest payments which the corporation is required to make for the right to use and possess property in which it has not title, interest or equity. See Note 6 (a).

5. (a) Losses: Losses deductible under this item must be distinguished from depreciation or allowances for exhaustion, wear and tear. The losses must be absolute, complete, actually sustained during the year and charged off on the books of the corporation, and if the losses result from the sale of assets acquired prior to March 1, 1913, such losses shall be ascertained by taking the difference between the fair market price or value as of March 1, 1913, and the selling price.

Losses compensated by insurance or otherwise are not deductible.

Kind of asset.	Original amount.	Date charged off.	Amount charged off.
Bad Accounts Receivable		Dec. 31-15	\$55,513.85
Total			\$55,513.85

When were the deducted losses ascertained to be such? During year.

How were they so ascertained? By suit or otherwise.

In case of losses resulting from the sale of capital assets acquired prior to March 1, 1913, state

	(1) Original cost of assets	\$—
5-4	(2) Fair market price or value as of March 1, 1913.	\$....
	(3) Loss resulting from such sale

State also how the fair market price or value as of March 1, 1913, was ascertained.

(b) Depreciation: The amount deductible on account of depreciation is an amount charged off which fairly measures the loss during the year in the value of physical property by reason of exhaustion, wear and tear. Such amount should be determined upon the basis of the cost of the property and the probable number of years constituting its life. Stocks, bonds, and like securities, as well as any other intangible assets, are not subject to exhaustion, wear and tear within the meaning of the law. Hence any amount charged off as representing a shrinkage in the value of such assets is not deductible either as depreciation or loss.

Depreciation computed on total invoice value of merchandise in stock is not an allowable deduction, since any loss due to the shrinkage in the salable value of the merchandise will be reflected in the sale when the merchandise is disposed of.

Kind of property.	Its cost.	Probable life after acquirement.	Amount of depreciation.	
			This year.	Previous yrs.
On plant buildings office furn. & Fixts. Shops Tools, Etc.	172,972.89	
Totals.....			172,972.89	

(c) Depletion: Depletion applies to the exhaustion of natural deposits, and contemplates a deduction to return to the corporation the capital invested, or in case of purchase prior to March 1, 1913, an amount sufficient to return to the corporation the fair market value of such deposits as of that date. An allowable deduction on account of depletion must not exceed the fair market value in the mine of the product thereof mined and sold during the year, and in case of oil or gas wells the amount deductible should be computed upon the basis of the decline in the settled flow. The amount sought to be deducted on this account must be charged off on the books of the company.

Kind of property.	Its cost if acquired subsequent to March 1, 1913.	Fair market value as of March 1, 1913.	Amount of depletion.	
			This year.	All years to date.
.....	\$.....	\$.....	\$.....	\$.....
		None.		

#Coal, Iron ore, copper, oil or gas.

†State how fair market value of March 1, 1913, was determined.

6. (a) Interest Deductible: The amount of interest deductible under this item is the amount actually paid within the year on an amount of bonded or other indebtedness not in excess of the paid-up capital stock outstanding at the close of the year, or if no capital stock, the entire amount of capital (not including interest-bearing indebtedness) employed in the business at the close of the year, plus, in each case, one-half of the interest-bearing indebtedness also then outstanding.

Capital employed in the business, as here used, contemplates the entire capital paid in by the members of the company, including so much of the accumulated surplus as is not in excess of the needs of the business, but does not include any borrowed capital or interest-bearing indebtedness.

Interest, so-called, or dividends paid upon preferred capital stock, is not deductible.

Interest deductible under this item includes all interest actually paid within the year not in excess of the limit hereinbefore indicated on any debt for which the corporation or any property in which it

has title, interest, or equity is pledged, except interest on indebtedness wholly secured by collateral the subject of sale or hypothecation in the ordinary business of the company, etc., which interest is deductible under Item 4 (b) as a business expense.

Interest Payments Actually Made During Year.

All forms of indebtedness upon which interest was paid should be listed here.

Name or kind of obligation.	Amount of principal.	Rate of int.	Amount of interest paid.
On notes,	Varying	\$45,183.17
Total			\$45,183.17

(b) Interest paid on deposits: Interest paid (by banks) on deposits or on money received for investment and secured by interest-bearing certificates of indebtedness issued by a bank, banking association, loan or trust company is deductible in the entire amount so paid.

7. (a) Taxes—Federal, State, Etc..... \$48,180.65

(b) Taxes—Foreign None

Taxes deductible under these items are such taxes as are imposed by the United States, by any State or Territory, or by any political subdivision thereof, or by the Government of any foreign country,

and are actually paid or accrued on the books of the corporation, not in excess of the amount due and payable within the year for which the return is made, except that taxes imposed under the laws of a foreign Government are not deductible from the income arising and accruing to a foreign corporation by reason of the business transacted or capital invested in this country, and except that taxes paid for local benefits or taxes paid by corporations pursuant to covenants guaranteeing their bonds to be tax-free, are not deductible.

Taxes paid by banks or other corporations on the value of their capital stock outstanding and in the hands of stockholders are not deductible. Such taxes are a primary liability of the stockholders, as such chargeable against their income.

State whether or not this return is made on the basis of actual receipts and disbursements —.

If not describe fully what other basis or method was used in computing net income —.

Where sufficient space is not provided for the entry of the information required in the "Supplementary Statement," lists containing full information in the form indicated should be marked in accordance with the particular item and attached to this form.

EXHIBIT B.

New York, March 27, 1916.

Honorable Tax Commissioner,
State of Connecticut,
Hartford, Conn.

58 This return is made and filed under protest, to prevent the imposition of a penalty, and without waiving the right to claim:

- (1) That no tax is due or collectible from this corporation, and
- (2) That the portion of the statute providing for a return and tax is in violation of the provisions of the Constitution of the United States in that it constitutes a tax and burden upon interstate commerce contrary to Section 8 of Article I and upon the income of business and sales made outside the State of Connecticut contrary to the Fourteenth Amendment.

Yours very truly,

UNDERWOOD TYPEWRITER COMPANY.

_____,
President.

EXHIBIT C.

State of Connecticut.

Taxation of Miscellaneous Corporations.

(Part 4, Chapter 292, Public Acts of 1915.)

To be returned to the tax commissioner on or before April 1st, 1916.

The amount of the annual net income must be identical with that given on the last return made to the Collector of Internal Revenue and as subsequently corrected by any authorized official of the United States.

Return of Net Income for the Calendar Year Ended December 31, 1915, fiscal.

59 Penalty for Neglect or Failure to Make Report as Required or for Rendering False or Fraudulent Report.

"Sec. 24. Any such company which fails to make any return required by the provisions of part four, or renders a false or fraudulent return, shall be liable to a penalty of not more than ten thousand dollars, to be paid to the state, and to be collected in a civil action brought in the name of the state in Hartford county, and any

person or any officer of any such company who makes a false or fraudulent return or statement with intent to defeat or evade payment of the tax required by the provisions of part four shall be fined not more than two thousand dollars, or imprisoned not more than one year, or both.

"Sec. 25. If any such company fails to render any return required by the provisions of part four, or renders a false or fraudulent return, the tax commissioner, according to the best information obtainable, shall make such return, according to the form prescribed, of the income liable to a tax, shall lay such tax on the amount so determined, and in case of false or fraudulent return or valuation shall add one hundred per centum to such tax, or in case of failure to make a return, or to verify the same, he shall add fifty per centum to such tax."

Part 4, Chapter 292, Public Acts of 1915.

To the Tax Commissioner of Connecticut:

1. (a) Statement of The Underwood Typewriter Company
(Name of corporation, joint-stock company, or association.)

Manufacturing.

(Kind of business)

(b) The location of the principal office is

60 No. 30 Vesey Street
(Street and number)

New York City
(Town)

New York
(State)

New York
(Country)

(c) The state under the laws of which organized: Delaware

Date of organization: March 8, 1910.

(d) List of subsidiary companies and location of principal place of business of each:

Underwood Typewriter Co.	New York,	New York	
"	"	City,	New York.
"	"	Jersey City,	New Jersey.
"	"	Massachu-	
"	"	setts,	Boston,
"	"	Michigan,	Detroit,
"	"	Pennsyl-	Philadel-
		vania,	phia,
			Penna.

2. Amount of paid-up capital stock outstanding at close of year, or, if no capital stock the capital employed in the business at the close of the year.....\$13,000,000.00

3. Total amount of bonded and other indebtedness at the close of the year.....\$1,806,892.80

If no figures are to be extended⁸ opposite any item in the report, the word "None" should be inserted.

(Figures given should include any changes made by any authorized official of the United States.)

	Dollars.	Cts.
4. Gross Income:		
(a) From operations	\$7,579,776.	00
(b) " rentals	44,400.	00
(c) " interest	29,456.	00
(d) " dividends received	8,288.	19
(e) " other sources	14,627.	36
Total gross income.....	\$7,676,547.	55
Total deductions	6,339,961.	42

9. Net Income\$1,336,586.13

	Dollars.	Cts.
5. Deductions:		
(a) Expenses general, including rentals.....	\$6,018,210.	86
(b) Payments in lieu of rent.....	None	
6. (a) Losses sustained.....	55,513.	85
(b) Depreciation	172,972.	89
(c) Depletion (natural deposits).....	None	
7. Interest paid	45,083.	17
8. (a) Taxes, domestic paid.....	48,180.	65
(b) Taxes, foreign paid.....	None	
Total deductions	\$6,339,961.	42

10. Total amount of taxes paid upon net income to the internal revenue department (This question not to be answered this year) for the next preceding the one for which this return is made.....\$.

11. Was the amount of the annual net income as last returned by this corporation changed or corrected by an official of the United States? No.

Supplemental Reports: "If the amount of the annual net income as returned by each such company to the collector of internal revenue is changed or corrected by the commissioner of internal revenue or by other official- of the United States, such company, within ten days after receipt of notification of such change or correction, shall make return under oath or affirmation to the tax commissioner of such changed or corrected net income upon which the tax is required to be paid to the United States. If any deduction is made from the net income as returned, the comptroller shall draw his order in favor of such company on the treasurer, on the voucher of the tax commissioner for the amount of any tax paid upon such

deduction, or if any addition is made, such company shall, within thirty days after receipt of notice from the tax commissioner, of the amount of such addition, pay the tax thereon." Sec. 21, Part 4, Chapter 292, Public Acts of 1915.

62 12. Is business carried on outside of Connecticut? Questions 12 (a) to 13 (b) inclusive are required to be answered only by companies carrying on business outside of Connecticut. (Answer yes or no.)

12. (a) Are the profits principally from the ownership, sale or rental of real estate?..... No.
- (b) Are the profits principally from the sale or use of tangible personal property?..... Yes.
- (c) Are the profits principally from the holding or sale of intangible property?..... No.

Companies deriving profits principally from ownership, sale or rental of real estate or sale or use of tangible personal property are required to answer questions 12 (d) and 12 (e).

(d) Fair cash value of real estate and tangible personal property in each town in this State:

(No deduction to be made on account of any incumbrance thereon).

Town.	Value.	Town.	Value.	Town.	Value.
Hartford	\$2,977,827.67				
New Haven.					
Total	\$2,977,827.67				

(e) Fair cash value of real estate and tangible personal property located outside of this state:

(No deduction to be made on account of any incumbrance thereon).

Location.	Value.	Location.	Value.	Location.	Value.
Principal cities of the United States and abroad.					

Total \$3,343,155.11

Companies deriving profits principally from the holding or sale of intangible property are required to answer questions 13 (a) and 13 (b).

63 13 (a) Gross receipts from business carried on within Connecticut, \$

13 (b) Gross receipts from business carried on outside of Connecticut \$

General Instructions and Information.

The word "year" as used in this blank refers to calendar or fiscal year which was used as the basis of the report to the internal revenue collector.

"Principal Office" is the office of the company in which are kept the books of account, papers, and other data from which the return is prepared.

Signatures and affirmation.—Returns must be sworn to or affirmed by two officers of the company, that is, by the president, vice-president, or other principal officer, and the treasurer or assistant treasurer, and must be sworn to before an officer authorized to administer oaths, and the seal of the attesting officer, if he is required to have a seal, must be impressed on the return in the space provided for that purpose.

Time for filing returns.—Returns are required to be filed on or before April 1st of each year and no provision is made for extension of time in cases of neglect to file returns on the date required.

Date when tax is due.—The tax of two per centum on the net income as determined is payable on or before the first day of August in each year. Statement of amount of tax due will be mailed to each corporation in July in each year, but failure to receive statement will not excuse nonpayment of tax.

64 Liability for return.—The word "company" as used in this blank includes every corporation, joint-stock company, and association. The following are excepted from making returns: Insurance and trust companies, state banks, savings banks, organized under the laws of this state, banking institutions organized under the laws of the United States and located in this state, express companies carrying on business on steam or electric railroads or street railways, steam or electric railroad or street railway corporations, companies whose principal business in this state is furnishing, leasing, or operating dining, sleeping, chair, parlor, refrigerator, oil, stock, fruit or other cars, corporations whose principal business is manufacturing, selling and distributing illuminating or heating gas, or electricity to be used for heat, light, or motive power, or water for domestic or power purposes, telegraph, cable, and telephone companies.

Reports are treated as absolutely confidential by the officers and employees of the State, and a fine or imprisonment sentence is provided for violation of provisions concerning disclosure of information by such persons.

Inasmuch as the clerical work attached to the verification, computation, etc., of the tax on the several thousand corporations will be exacting, the receipt of this return on as early a date as possible, will be greatly appreciated.

We, officers of the above-named company whose return of net income is herein set forth, being severally duly sworn, each for himself, deposes and says that the items of said net income as herein set forth are a true copy of such items as were

65 included in its last return made to the collector of internal revenue of the annual net income arising or accruing from all sources in its fiscal or calendar year next preceding, or of such annual net income as it has been changed or corrected by an authorized official of the United States, and further that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular.

C. L. ROSSITER,
Vice-President,
D. W. BURGESS,
Treasurer.

March 27, 1916.

Sworn to before me this 27th day of March, 1916.

[Seal of Officer Taking Affidavit.]

EUGENE B. BOYER,
Notary Public, New York Co., N. Y.

EXHIBIT D.

New York, July 28th, 1916.

To the Treasurer of the State of Connecticut:

The undersigned, The Underwood Typewriter Company, herewith hands you check for \$12,593.37, being the amount of tax on said corporation as determined by the Tax Commissioner of the State of Connecticut upon the amount of its net income taxable in the State of Connecticut under Part 4 of an Act known as Chapter 292 of the Laws of 1915 of the State of Connecticut.

66 This is to notify you that this tax is paid into the State Treasury not willingly, but under protest, in order to escape thereby irreparable injury through the enforcement of the penalties and coercive features of the Act, and in order to prevent, through the application of Section 23 of said law, the filing of a lien upon the real estate of the undersigned corporation within this State.

And for grounds of said protest, the undersigned corporation hereby states:

1. Part 4 of Chapter 292 of the Laws of 1915 in respect to this corporation is void as offending the constitution of the United States both (a) in taxing or attempting to tax by a State the instrumentalities, gains and profits of a corporation engaged in and derived from the business of interstate commerce; (b) in violating the equal protection clause of the Fourteenth Amendment to said Constitution.

2. The undersigned corporation further protests against said tax so laid under the provisions of said Act, and especially alleges as such ground of protest the inequality, inaccuracy and injustice of the determination by the Tax Commissioner of the State of Connecticut of the fair cash value of its real estate and tangible personal property in the State of Connecticut on the date of the close of the fiscal year of such corporation in the year last preceding, and the fair cash value of its entire real estate and tangible personal property then owned by it, and wherever situated.

UNDERWOOD TYPEWRITER COMPANY,
CLINTON L. ROSSITER,

Vice-President.

(Endorsements.)

18765. The Underwood Typewriter Co. vs. Frederick S. Chamberlain, Treas. Agreed Finding of Facts. Filed Feb. 21, 1919.
Geo. A. Conant, Clerk.

Superior Court, Hartford County, February 20, 1919.

THE UNDERWOOD TYPEWRITER COMPANY

VS.

FREDERICK S. CHAMBERLAIN, Treasurer.

Stipulation for Reservation.

It is hereby stipulated in the above entitled cause that the questions at issue are as detailed in the pleadings and in the foregoing agreed finding of facts:

That the issues therein shall be reserved for the determination of the Supreme Court of Errors next to be holden for the First Judicial District, and that said reservation may be transferred to any other Judicial District convenient for argument.

That the questions upon which the advice of the Supreme Court is desired are as follows:

(1) Whether or not under said pleadings and said agreed finding of facts, and in respect to the Underwood Typewriter Company, the portion of the statute providing for the return and tax and the assessment and apportionment thereof under and in accordance with Sections 19 to 23 inclusive of Chapter 292 Public Acts of 1915, is in violation of the provisions of the Constitution of the United States, in that it constitutes a tax or burden on interstate commerce contrary to Section 8 of Article 1, and upon the net income of business and sales made outside the state contrary to the Fourteenth Amendment to said Constitution.

(2) Whether or not the amount assessed upon the Underwood Typewriter Company under said sections of Chapter 292 of the Public Acts of 1915 is illegal and excessive for the reason that it is

based not only upon the net income of the corporation from its business within the State of Connecticut, but upon the net income of the corporation from its business both within and outside the state.

(3) Whether or not that portion of the statute providing for a disclosure by the Underwood Typewriter Company to the officials of Connecticut of its report made to the Federal Government on which an income tax is assessed by said Government is in violation of Section 2 of Article 4 of the Constitution of the United States and contrary to the Fourth, Fifth and Fourteenth Amendments, or any of them.

And the parties further stipulate that the present determination of the above questions by this court would be in the interest of simplicity, directness and economy in judicial action, the particular ground for such statement being that the questions raised herein are of great importance as affecting not only the Underwood Typewriter Company but also many other corporations similarly situated, and the state.

It is further stipulated that the questions raised herein are certain to enter into the final determination of the cause, and the parties request that said questions be reserved for the advice of the Supreme Court of Errors.

69 The Plaintiff, THE UNDERWOOD TYPEWRITER
COMPANY,

By GROSS, HYDE & SHIPMAN,
Its Attorneys.

The Defendant, FREDERICK S. CHAMBERLAIN,
Treasurer,

By GEORGE E. HINMAN,
JAMES E. COOPER,
His Attorneys.

(Endorsements.)

The Underwood Typewriter Company vs. Frederick S. Chamberlain, Treasurer. Superior Court, Hartford County. Stipulation for Reservation. Filed Feby. 21, 1919. Geo. A. Conant, Clerk.

Superior Court, Hartford County, February 21st, 1919.

THE UNDERWOOD TYPEWRITER COMPANY

VS.

FREDERICK S. CHAMBERLAIN, Treasurer.

Reservation.

The above entitled action came to this court by writ and complaint dated September 26, 1916, on the first Tuesday of November, A. D. 1916, and thence by continuance to the present time.

Upon request of all the parties to this action and pursuant to stipulation as on file, the questions of law upon which advice is desired as stated in said stipulation and arising upon the pleadings and agreed statement of facts as on file, are hereby reserved for the consideration and advice of the Supreme Court of Errors at its term to be held within and for the First Judicial District at Hartford on the first Tuesday of March A. D. 1919.

CASE,

Judge.

(Endorsements.)

18765. The Underwood Typewriter Company vs. Frederick S. Chamberlain, Treasurer. Superior Court, Hartford County. Reservation. Filed Feb. 21, 1919. George A. Conant, Clerk.

Supreme Court of Errors, Third Judicial District (Transferred from First Judicial District), Hartford County, June Term, 1919.

UNDERWOOD TYPEWRITER COMPANY

VS.

FREDERICK S. CHAMBERLAIN, Treasurer.

Action for an Order Directing the State Treasurer to Repay to the Plaintiff the Amount of a Certain Tax Paid by it under Protest, and for Other Relief, Brought to the Superior Court in Hartford County and Reserved upon an Agreed Statement of Facts for the Advice of this Court.

71 The tax in question was assessed against the plaintiff in respect of its operations within this state for the year 1915, pursuant to sections 19 to 23 inclusive of Part IV of Chap. 292 of the Public Acts of 1915, which are printed in the margin. Part IV of the Acts deals with miscellaneous corporations, defined as all corporations required to report to the collector of internal revenue under the income tax law of the United States except insurance, banking, transportation and public service corporations. It provides for the payment by every such corporation carrying on business in this state of an annual tax of 2% on the net income upon which it is required to pay a tax to the United States, and in case such corporation also carries on business outside of the state, it provides for the payment of a like tax upon a part only of its net income, apportioned in the manner specified in Section 22. No distinction is made in the act between domestic and foreign corporations.

The plaintiff is a Delaware corporation deriving profits principally from the manufacture, sale and repair of so-called Underwood typewriters. Its only manufacturing plant is in Hartford, Connecticut. It also sells and rents adding machines made in Connecticut by other manufacturers, rents slot machines made by it in Connecticut, and sells desks and other typewriting supplies not

manufactured in this state. The plaintiff's gross profits from its sales and its receipts from all other sources within and without the state were as follows for the year 1915.

72	Gross profits from sales of company's typewriter products manufactured in Connecticut	\$6,209,316.40
	Receipts from rentals of slot machines manufactured by the plaintiff in Connecticut	191,368.58
	Receipts from rentals of company's products, typewriters manufactured in Connecticut	435,645.80
	Receipts from sale of adding machines manufactured in Connecticut by a third party	31,186.21
	Dividends	8,288.19
	Discounts	14,627.13
	Interest	29,456.00
	Receipts from sale of desks, furniture and other accessories not manufactured in Connecticut	162,548.43
	Rental of Connecticut real estate	44,400.00
	The plaintiff's expenses other than manufacturing costs were	6,249,961.42
	And its net income on which a tax was payable to the United States was	1,336,586.13

The term gross profits in the above tabulation means receipts less manufacturing costs. General administrative expense including salaries, selling expenses and other similar charges are included in the amount deducted from gross receipts to ascertain net income.

The fair cash value of the plaintiff's real estate and tangible personal property located within the state of Connecticut on 73 January 1st, 1916, was \$2,977,827.67; and the fair cash value of its real estate and tangible personal property located without the state of Connecticut was \$3,343,155.11.

The plaintiff made and filed with the tax commissioner of Connecticut a return under protest showing the net income on which it was required to pay a tax to the United States. The tax commissioner apportioned the sum of \$629,658.50 as the portion of its net income on which the plaintiff was required to pay a tax of 2% in the state of Connecticut, and the plaintiff subsequently paid to the state treasurer the assessed tax of \$12,593.37 under protest, claiming that Part IV of Chapter 292, Public Acts of 1915 was, as against the plaintiff, void as an attempted restraint on interstate commerce, and because it violated the Fourteenth Amendment to the Federal Constitution.

The cause came before us on an agreed statement of facts including those above outlined, and others stated in the opinion. Our advice is asked on the following questions:

Arthur L. Shipman, Josiah H. Peck, Eugene B. Boyer, for the plaintiff.

Attorney-General George E. Hinman, James E. Cooper, for the defendant.

Arthur H. Marsh, by leave of court, as amicus curiae,

74 BEACH, J.:

It is necessary in the first place to determine the nature of the tax complained of. The state contends that it is in the nature of an excise tax, the plaintiff that it is a tax on property, and the brief filed by the amicus curie that it is an income tax. We think the state is right in its characterization of the tax. It is not a tax on property. The plaintiff pays a separate local tax on its property. This tax falls on income and not on property. If the plaintiff had made no net income for the year 1915 it would have escaped this tax altogether, although its taxable property in Connecticut on July 1st, 1915 remained the same as before.

It is not an income tax as such because it is assessed only if and when the corporation does business within the state, and in the case of domestic corporations doing business in this and other states there is no attempt to assert personal jurisdiction for the purpose of taxing their entire income. Foreign and domestic corporations are treated alike, and the entire income is not taxed unless the entire business of the corporation is done within the state. It is apparent, therefore, that the basis of the tax is not jurisdiction over the property or over the person of the corporation, but jurisdiction over its business; and that it is a tax in the nature of an excise tax levied against domestic and foreign corporations alike for the privilege of doing business in a corporate capacity within this state.

In 1917 the General Assembly (Chap. 298, Sec. 6) characterized the tax as follows: "The tax * * * shall be in lieu of all other taxes upon the franchises of the domestic corporations included in the companies defined in said Part IV, except the tax on capital stocks provided in Sec. 61 of Chap. 194 of the Public Acts of 1903, and shall be in lieu of all other taxes on the privilege of doing business with this state upon the foreign corporations included in the companies defined in said Part IV."

The legislative construction thus put upon Part IV of the Act, although not in itself conclusive, is consistent with its practical consequences, and accords with the conclusion already stated.

The fact that the tax is measured by a percentage of net income, or in the case of a corporation engaged in interstate commerce by a percentage of a part of its net income proportioned to the amount of its tangible property in this state, does not, of course, prevent it from being an excise or privilege tax.

The next question is whether the tax, regarded as an excise or privilege tax is, in its application to the plaintiff corporation, an unlawful restraint on interstate commerce.

This question appears to us to have been answered in the negative by the recent case of *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321, wherein the Supreme Court took occasion to point out some of the things which a state might lawfully do in levying taxes on the net incomes of corporations engaged in interstate commerce. We quote from page 326, "But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed or a tax may be imposed on the cor-

poration on account of its property within a state, and may
76 take the form of a tax for the privilege of exercising its
franchise within the state if the ascertainment of the amount
is made dependent in fact on the value of its property situated within
the state (the amount exacted therefor not being susceptible of ex-
ceeding the sum which might be leviable directly thereon) and if
payment be not made a condition precedent to the right to carry
on business but its enforcement left to the ordinary means devised
for the collection of taxes." And again on pages 328-9: "A tax
on gross receipts affects each transaction in proportion to its magni-
tude and irrespective of whether it is profitable or otherwise. Con-
ceivably it may be sufficient to make the difference between profit
and loss or to so diminish the profit as to impede or discourage the
conduct of the commerce. A tax upon the net profits has not the
same deterrent effect, since it does not arise at all unless a gain is
shown over and above expenses and losses and the tax cannot be
heavy unless the profits are large. Such a tax, when imposed upon
net incomes from whatever source arising, is but a method of dis-
tributing the cost of government like a tax upon property, or upon
franchises treated as property; and if there be no discrimination
against interstate commerce whether in the admeasurement of the
tax or in the means adopted for enforcing it, it constitutes one of
the general and ordinary burdens of the government from which
persons and corporations otherwise subject to the jurisdiction of
the states are not exempted by the Federal Constitution because
they happen to be engaged in commerce among the states."

77 The plaintiff contends that the Glue Co. case is authority
for the taxation of net incomes of domestic corporations only.
But this ignores the plain statement above quoted that a tax which
is in form a tax for the privilege of exercising its franchises within
the state may be levied upon a corporation whether foreign or do-
mestic engaged in interstate commerce, if the ascertainment of its
amount is made dependent in fact on the value of its property within
the state, and if it does not exceed the sum which might be leviable
directly thereon.

Of course, no tax at all can be laid by any state which is in form
or effect a direct tax on interstate commerce. And for the purposes
of this case the significance of the quotation from pages 328-9 of the
opinion is that the tax on net income—as distinguished from a tax
on gross receipts, condemned in *Oklahoma v. Welis Fargo Co.*, 223
U. S. 298, and in *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292—
is not in form or effect a direct tax on interstate commerce. It is,
therefore, a tax which a state may assess against persons or corpora-
tions engaged in interstate commerce provided it keeps within its
jurisdiction in other respects and within the limitations noted in
the opinion.

As we read the opinion in the Glue Company case it decides that
within the limitations stated a state may tax the entire net income of
a domestic corporation engaged in interstate commerce; and it points
out as a logical consequence of this decision that a state may, under
the form of a privilege tax, tax some fractional part of the net in-

78 come of a foreign corporation engaged in interstate commerce, provided that the apportionment is made dependent in fact on the value of its property situated within the state, that the amount of the tax is not excessive regarded as a tax on property within the state, and that there is no discrimination against interstate commerce in the admeasurement or enforcement of the tax.

The tax in question complies with every requisite pointed out. It is made dependent in fact on the value of the plaintiff's tangible property in Connecticut at the close of its fiscal year next preceding the assessment, and in determining its reasonableness from the jurisdictional standpoint, the fact should be regarded that all corporations deriving profits principally from the sale of tangible personal property, and most, if not all, corporations deriving profits principally from the use of such property, will almost necessarily have on hand at any given time and place but a small part of the property which constituted their entire local stock in trade for the year.

It is so in this case, for the schedules show that the plaintiff's typewriter products manufactured in this state and sold during the year 1915 brought approximately six millions of dollars over and above manufacturing costs. All of this property was within the protection and the taxing jurisdiction of Connecticut for some part of the year 1915; and the plaintiff was not otherwise taxed in this state on any part of it, except the relatively small part which happened to be on hand on the day when its property was valued for local taxation in Hartford. Adding this value, or any reasonable part of it, to the agreed value of the plaintiff's tangible property in this state on January 1st, 1916, the tax complained of cannot amount to two-tenths of one per cent of the plaintiff's total taxable property located in this state during the year 1915.

79 The payment of the tax is not made a condition precedent to the right to carry on the business, but its enforcement is left to the ordinary means for the collection of taxes and there is evidently no discrimination against interstate commerce or foreign corporations.

Since we rest our decision, so far as the commerce clause of the Federal Constitution is concerned, squarely on the opinion in the Glue Company case, it is useless for us to review the authorities whose aggregate effect is authoritatively summed up in that opinion. It is enough to say that no later decision of that court has been brought to our attention which in any way qualifies or restricts the fundamental proposition that a state tax which is otherwise within the constitutional and jurisdictional limits of its taxing power, is not unconstitutional because it takes the form of a tax on the entire net income of a domestic corporation engaged in inter-state commerce, nor because it takes the form of a tax on a part of the net income of a foreign corporation engaged in interstate commerce.

It may be added that the provisions for the apportionment of net income according to the relative value of tangible property within and without the state distinguish our statute from those which were under consideration in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *Looney v. Crane*, 245 U. S. 178, and *International Paper*

Co. v. Massachusetts, 246 U. S. 135. In each of these cases a
80 state tax which was in form a permit or excise tax was assessed as a percentage on the entire capital stock of foreign corporations, and was held to be "Essentially for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property including that in other states; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located." 246 U. S. 142.

The case of Baldwin Tool Works v. Blue, 240 Fed. Rep. 202, may be briefly referred to for it is directly in point. In that case the West Virginia Statute, which was upheld, required every corporation doing business both in and out of the state to pay a percentage tax on a part of its net income apportioned according to the value of all its property within and without the state.

The brief filed by the amicus curiae calls attention to the fact that Professor Powell has criticised the opinion in Baldwin v. Blue. But in a later article the learned author admits the United States Glue Company case "shakes the criticism heretofore passed on Baldwin Tool Works v. Blue," and explains in a foot note that his former criticism assumed that there was no distinction to be drawn between an excise measured by net profits and one measured by gross receipts.

The first question submitted to us also raises the issue that the tax complained of violated the Fourteenth Amendment because it is a tax upon the net income of business done and sales made outside of
81 the state. The issue thus stated erroneously assumes that the tax is an income tax as such and not a tax for the privilege of carrying on a manufacturing business in this state. It also ignores the fact that the tax is not assessed upon the entire net income of the plaintiff, but upon 47% only of its entire income, the remaining 53% being automatically exempted by the statutory rule of apportionment.

The real question is whether a privilege tax of 2% on 47% of the plaintiff's net income is a tax on its business done or its property located outside of this state. Speaking generally the situation is that the plaintiff carries on its entire manufacturing business within this state. Its gross receipts from the sale of its products manufactured in this state amount to about 90% of its total receipts and after deducting manufacturing costs, its gross profits from the sale of this product amount to about 80% of its total receipts from all sources. Its selling business is managed from its main offices in New York to which all orders for the sale and rental of typewriters and other products are forwarded. The plaintiff's officials at its main office direct its factory managers in Hartford to ship typewriters and other products direct to the various branch offices for the purposes of making deliveries to the purchasers and lessees thereof. It thus appears that the bulk of the plaintiff's products is also warehoused in Connecticut until sold, and in that way receives additional protection from the state.

It is plain that a privilege tax, if otherwise reasonable, might be levied upon every dollar of net income derived from the sale of

goods thus manufactured, or manufactured and warehoused, in Connecticut, without justifying the complaint that the plaintiff is taxed upon business done or property located outside of the state.

82 Regarded as a tax on property no claim can well be made that the tax is so unreasonable in amount as to justify the complaint that it practically results in taxing property without the state; it amounts to less than two-tenths of 1% of the market value of the plaintiff's typewriter products manufactured in Connecticut after charging off manufacturing costs. Regarded as a tax on the privilege of doing business in this state, the same answer applies to any complaint that the tax is in substance a tax on business done without the state. A corporation whose manufacturing business produces an annual product exceeding \$6,000,000 in market value cannot reasonably complain that a privilege tax of \$12,500 is too large to be reasonably allocated to that part of its business.

The argument against the constitutionality of the statutory apportionment must come, we think, to the point of successfully showing that 47% of the plaintiff's net income cannot reasonably be attributed to its manufacturing and warehousing and shipping operations in Connecticut. Incidentally the plaintiff also received about \$100,000 from sales and rentals in Connecticut. But laying that aside, the plaintiff's argument on this branch of the case carries the burden of showing that 47% of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80% of its gross earnings was derived after paying manufacturing costs. Upon this record the plaintiff has made no attempt to shoulder such a burden and if it had been possible, by expert evidence or otherwise, to lay any basis of

83 evidence for such a claim, we should suppose that the plaintiff would have, at least, attempted to do so. As the record stands, we are asked to take judicial notice of the fact that 47% of the net income of the plaintiff corporation cannot reasonably be attributed to its operations in Connecticut, and to declare the statute unconstitutional upon the bare assertion that the statutory method of apportionment as applied to the plaintiff's income taxes property and business without the state, although 57% of the plaintiff's income is exempted by the apportionment.

The only specifications which the plaintiff's brief furnishes in support of its charge that the statutory apportionment results in the taxation of its property and business in other states are based upon the allegation that the income taxed necessarily includes receipts from repairs made in other states, from profits on the sale of adding machines manufactured by third parties, from dividends, discounts and interest received outside of Connecticut, and from the sale of desks, etc., manufactured outside of this state. The receipts from these items aggregate less than 10% of the plaintiff's total gross receipts, and except for the items of dividends and interest the extent to which they produced net income is wholly uncertain. As to the other 90% of the plaintiff's gross receipts, it is tacitly admitted that some part of them, and therefore some part of the net income result-

ing therefrom, is attributable to the plaintiff's property and business in Connecticut. On this record the amount of the plaintiff's net profit attributable to its operations in Connecticut cannot be ascertained. It is a matter of estimate and approximation rather

84 than of mathematics. The most that can be expected is that a statutory rule should be laid down intended and adopted to produce a fair and constitutionally lawful apportionment. Then the rule must be tested by the results which it produces, but with due regard to the impossibility of producing anything but approximate results; in the present instance, it seems clear that the result is not unreasonable, oppressive or unconstitutional.

Some general criticisms of the rule of apportionment are made. It is said that the real defect in the law is that the income is apportioned with reference to the value of tangible property in Connecticut as compared with tangible property elsewhere; whereas the apportionment should have been founded on the proportionate holdings of property of all kinds within and without the state. It is pointed out that if intangibles were included in the comparisons foreign corporations would fare better, since their intangible assets would have a situs at the domicile. But the suggestion that the rule was adopted for the purpose of getting the largest possible return from corporations engaged in interstate commerce is not tenable because the rule applies to domestic as well as to foreign corporations. If the object of the legislature had been to get the largest return it would have resorted to its personal jurisdiction over domestic corporations and taxed their entire net income from business wherever carried on.

A more reasonable explanation of the rule is to be found in the nature of the tax and in the class of corporations to which the particular rule in question is applied. As already pointed out, the tax is a tax on the privilege of doing business in a corporate capacity in this state. The legislature evidently intended to make the tax proportionate to the value of the privilege. Accordingly, it divided miscellaneous corporations doing an interstate business, without making any distinction between domestic and foreign corporations, into two classes (*a*) those deriving profits principally from the sale or use of tangible personal property, and (*b*) those deriving profits principally from the holding or sale of intangible property. As to class *a* the rule of apportionment is based on tangible property within and without the state, and as to class *b* on gross receipts within and without the state. The attempt to do substantial justice is manifest. The plaintiff's theory is that the real producing elements of net income depend on the executive management of the corporation, rather than on its plant. But the ordinary trading or manufacturing corporation is commonly supposed to make its profit from the intelligent use and sale of tangible property, and other things being equal it is not unjust to allocate its net income, for purposes of estimating the value of the privilege of doing business here, with reference to the value of its tangible property in this and other jurisdictions.

A suggestion that the rule works injustice in this case is based

on the plaintiff's return to the tax commissioner showing paid up capital stock of \$13,000,000. The agreed fair cash value of the entire tangible property of the plaintiff within and without the state is only \$6,300,000, and the plaintiff's brief assumes that the difference of \$6,700,000 represents tangible assets of that value now owned by the plaintiff. There is, of course, no presumption that paid up capital represents existing assets, and except for the receipt of dividends and interest amounting to about \$38,000 there is nothing in the record to show that the plaintiff owned any intangible assets on the taxing date in question.

These considerations dispose of the first and second questions submitted.

The third question requires no discussion. The Federal Income Tax Law is a domestic statute. No delegation of legislation authority is involved in adopting its definition of net income. It is a matter of convenience to taxpayers and economy to the state not to set up a separate standard and another administrative establishment for the measurement of taxable net income. No constitutional privilege of corporations is violated by requiring the production of the plaintiff's return to the Collector of Internal Revenue.

The first, second and third questions are answered in the negative, and the Superior Court is advised to render judgment for the defendant.

In this opinion the other judges concurred, except Wheeler, J., who dissented.

The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JAMES P. ANDREWS,

Reporter.

Per W. E. O.

87

(Endorsements.)

18765. Underwood Typewriter Co. vs. Frederick S. Chamberlain, Treasurer. Supreme Court of Errors, Third Judicial District, (Transferred from First Judicial District.) Hartford County June Term, 1919. Beach, J. Filed July 19, 1919. George A. Conant, Clerk.

Superior Court, Hartford County, October 10, 1919.

Hon. John E. Keeler, Judge.

No. 18765.

THE UNDERWOOD TYPEWRITER COMPANY

vs.

FREDERICK S. CHAMBERLAIN, Treasurer.

Judgment.

This action, by writ dated September 26, 1916, and complaint claiming a judgment that in so far as Chapter 292 of the Public Acts of 1915 attempts to tax the plaintiff, it is in violation of the constitution of the United States for the reasons set forth in said complaint, and therefore is void: a judgment or order directing the Treasurer of the State of Connecticut to repay to the plaintiff the amount of the tax paid by it as set forth in said complaint, namely \$12,593.37, with interest: such other and appropriate relief as to equity may appertain, came to this Court on the first Tuesday of November, 1916, and thence by continuance to the present time.

The plaintiff appeared by Gross, Hyde & Shipman, its attorneys, and the defendant by George E. Hinman and James E. Cooper, his attorneys.

Thereafter a demurrer to the complaint was filed by the defendant which was overruled as on file.

Thereafter answer was filed by defendant and upon an agreed finding of facts and stipulation for reservation as on file, certain questions of law were reserved for the advice of the Supreme Court of Errors.

Said questions are contained in said stipulation for reservation, dated February 20, 1919, as on file, and were as follows:

"(1) Whether or not under said pleadings and said agreed finding of facts, and in respect to the Underwood Typewriter Company, the portion of the statute providing for the return and tax and the assessment and apportionment thereof under and in accordance with Sections 19 to 23 inclusive of Chapter 292 Public Acts of 1915, is in violation of the provisions of the Constitution of the United States, in that it constitutes a tax or burden on interstate commerce contrary to Section 8 of Article 1, and upon the net income of business and sales made outside the state contrary to the Fourteenth Amendment to said Constitution.

(2) Whether or not the amount assessed upon the Underwood Typewriter Company under said sections of Chapter 292 of the Public Acts of 1915 is illegal and excessive for the reason that it is

based not only upon the net income of the corporation from its business within the state of Connecticut, but upon the net income of the corporation from its business both within and outside the state.

(3) Whether or not that portion of the statute providing for a disclosure by the Underwood Typewriter Company to the officials of Connecticut of its report made to the Federal Government on which an income tax is assessed by said government is in violation of Section 2 of Article 4 of the Constitution of the United States and contrary to the Fourth, Fifth and Fourteenth Amendments, or any of them."

Said Supreme Court of Errors having rendered its advice on said reserved questions, in its opinion, dated as on file, and having answered all said three questions in the negative,

This Court, therefore, finds the issues for the defendant, whereupon it is adjudged that the defendant recover of the plaintiff his costs taxed at \$— and — cents.

By the Court,

GEORGE A. CONANT,
Clerk.

(Endorsements.)

18765. The Underwood Typewriter Co. vs. Frederick S. Chamberlain, Treas. Judgment. Superior Court, Hartford County. October 10, 1919.

Superior Court, Hartford County, October 25th, 1919.

THE UNDERWOOD TYPEWRITER COMPANY

vs.

FREDERICK S. CHAMBERLAIN, Treas.

Stipulation in Reference to Additional Taxes Assessed against the Plaintiff on Its Income Tax Returns for the Years 1915 and 1916, Under Chapter 292 of the Public Laws of 1915.

90 Whereas the plaintiff has heretofore paid taxes assessed against it under the statute above named, for the years 1915 and 1916, said taxes being paid under protest, and also paid an additional tax on corrected returns for said years, of \$1407.53, also under protest, which said payment is due October 24, 1919, and

Whereas the plaintiff and defendant have litigation pending for the recovery by the plaintiff of the taxes heretofore assessed and paid by it under said law, in the course of which a judgment rendered under date of October 10, 1919, by the Superior Court for Hartford County, in favor of the defendant, is being carried to the Supreme Court of the United States on writ of error,

Now, therefore, it is hereby stipulated and agreed that the question of recovery of the amount paid by the plaintiff as additional tax aforesaid, namely \$1407.53, shall remain in abeyance and be treated as if application had been made to the Superior Court for review of assessment in accordance with the statutes in such case made and provided, and shall be determined by the result of litigation now pending for review of the assessments of taxes for the years 1915 and 1916.

UNDERWOOD TYPEWRITER COMPANY,
Plaintiff,

By SHIPMAN & GOODWIN,
Its Attys.

FRANK E. HEALY,
Att'y-Gen'l. for Defendant.

(Endorsements.)

18765. Superior Court, Hartford County. October 25th, 1919.
The Underwood Typewriter Co. vs. Frederick S. Chamberlain, T-
Stipulation *de* additional taxes. Filed Oct. 27, 1919. Lucius P.
Fuller, Assistant Clerk.

91 Supreme Court of Errors, Third Judicial District (Trans-
ferred from First Judicial District), Hartford County, June
Term, 1919.

UNDERWOOD TYPEWRITER Co.

vs.

FREDERICK S. CHAMBERLAIN, Treasurer.

WHEELER, J. (dissenting):

The opinion of the majority holds that the tax in question as authorized by the statute of Connecticut "is a tax in the nature of an excise levied against domestic and foreign corporations alike for the privilege of doing business in a corporate capacity within the state", and as such is not in violation of the commerce clause or the due process clause of the United States Constitution.

The case before us concerns a tax levied upon a foreign corporation doing a local business in Connecticut.

There are two classes of so-called privilege or excise taxes upon a foreign corporation. One is a privilege tax in name and fact,—a tax levied for the privilege of doing business in a state other than that of the corporate domicile and in no sense levied because of, or in relation to property value.

The other is a privilege or excise tax in name but in fact in its nature a property tax levied upon a corporation doing business in a state other than that of its domicile to compel payment of a tax upon the value of its property or business in that state as a going concern in relation to or in connection with its other property or

its entire business, and not covered by the local tax upon the physical property within the state.

The privilege tax proper is a tax upon the right of the foreign corporation to carry on a local business outside the state of its origin.

92 The foreign corporation engaged partly or chiefly in interstate business may be required to pay a privilege tax in respect of that business in any state other than that of its domicile where it does a local business. This tax may be a given sum, or it may be measured by its entire capital, or property, or receipts, or sales, or gross profits, or net profits, provided that the payment of the tax be not made a condition of the granting of the privilege and provided further that it appears from the circumstances that the tax is reasonable, that is, that it is what it purports to be, a mere privilege or excise tax, and not a tax which actually has the effect of hampering commerce or taxing property without the jurisdiction of the state of the tax.

A privilege tax as such measured by the entire property, or capital or receipts, or profits, gross or net, of a foreign corporation engaged in a local business within a state other than that of its origin reaches all its property, its receipts or its profits including that in other states, and hence must be held unconstitutional unless the circumstances show that the tax is a reasonable one and laid not upon the property but upon the right of the corporation to carry on a local business. And one of the ways in which the reasonableness and the ultimate purpose of the tax may be determined is the fixing in the statute of a maximum base sum beyond which amount the percentage cannot be allowed to realize. Such a tax will be held *prima facie* reasonable unless the circumstances compel another conclusion.

An instance of a privilege or excise tax measured by a percentage on capital stock uncontrolled by named maximum sum, and held a violation of the commerce clause is found in *International Paper Co. v. Mass.*, 246 U. S. 135. And an instance of a similar tax but its total exaction controlled by a named maximum and held not a violation of the commerce clause is found in *Baltic Mining Co., v. Mass.*, 231 U. S. 68.

That the reasonableness of the privilege tax is the test of its validity appears in *General Railway Signal Co. v. Virginia*, 246 U. S. 500, 511, where a statute providing for a specific fee of \$1000. upon corporations whose capital stock was between one and ten millions of dollars was upheld upon the basis of the reasonableness of the fee under all the circumstances although the case was said to be on the line.

When the opinions of the later cases are read in conjunction we think they will be found to hold that the limitation in a statute of a maximum privilege tax removes these constitutional objections unless the maximum be unreasonably high; that the maximum limitation may serve as evidence of the reasonableness of the tax and that a privilege tax which is reasonable and is not made a condition

of the right to do business can never be held to violate the commerce clause or the due process clause.

Baltic Mining Co. v. Mass., 231 U. S. 68;

International Paper Co. v. Mass., 246 U. S. 142;

Looney v. Crane Co., 245 U. S. 178;

General Railway Signal Co. v. Virginia, 246 U. S. 500.

The majority opinion reiterates that "the tax is a tax on the privilege of doing business in a corporate capacity in this state."

Our statute provides no maximum. The greater the real estate and tangible property here to that elsewhere the greater the amount of tax. And the greater the intangible property outside Connecticut the greater the tax.

The amount to be realized in this case is \$12,000; in 94 another case it might be \$100,000. Such a tax cannot be held reasonable. The decisions to which we have referred conclusively establish this.

If the majority opinion rested upon this proposition we might rest our discussion upon what has been said with the single addition of a discussion of the case of United States Glue Co. v. Oak Creek, 247 U. S. 321, upon the authority of which the court places its opinion. But the majority opinion goes further. It does not distinguish between these two classes of so called privilege taxes, and its chiefest argument in support of this tax is that "if the ascertainment of its amount is made dependent in fact on the value of its property within the state, and if it does not exceed the sum which might be leviable directly thereon," the tax may be levied.

Such a tax, though called a privilege tax, is in truth a species of property tax. It is based upon the value of its property within the state; it increases or diminishes as that increases or diminishes.

The tax attacked in this proceeding is one laid upon the net income of the plaintiff, a foreign business corporation, engaged in carrying on a local business in Connecticut. The plaintiff does all of its manufacturing in this state, and most of its sales and all of its financial business it transacts outside of this state. Practically, the production side of its business is here, and the commercial side outside Connecticut. All of its property here, and all of its business here, and all of its earnings here may be taxed separately or in connection with or in relation to the business as a whole, and to the business as a going concern provided the amount on which the tax is levied

95 fairly represents the value of its property here, or its earnings made here.

When the tax under consideration was authorized the plaintiff's taxes in this state were confined to a direct property tax on its real estate plant and tangible property on hand at the levy of the tax.

Throughout the year preceding the tax levy the corporation continued manufacturing its goods, and sending its product to its different branches outside our state where it was sold or rented.

While these goods were in process of manufacture, or held in stock, or in course of transit, in this state, they were subject to a state tax, justified upon the basis of all taxes, the protection afforded the goods and the business by the taxing government. And the local business

may have a value beyond the mere property here because it is a part of an interstate business.

Connecticut should have and does have the right to levy a tax proportioned to the protection afforded by it to the local business of the foreign corporation. This may be accomplished in a case like this by a tax upon all the product made, or upon the earning power of its business located here, or upon the net income derived from the property made here, based upon the value of the property and business here as a part of and in relation to a going concern engaged in interstate business.

U. S. Express Co. v. Minn. 223 U. S. 345.

Some of the decisions and their holding upon this point are the following:

It was held in *Adams Express Company v. Ohio State Auditor*, 166 U. S. 185, that a state statute taxing a corporation having
96 an interstate business may levy the tax not only on the tangible property within the state, but on such portion of the earning power of the property as the property in the state bears toward the whole property. And the local business may be taxed as a going business as a condition upon which the corporation is to continue to do business in the state.

Baltic Mining Co. v. Mass. 231 U. S. 68, 80.

But though the foreign corporation is engaged in interstate commerce, all of its property within a state is taxable there.

Baltic Mining Co. v. Minn. 231 U. S. 68, 82.

And "a legitimate tax may be laid in a state in part on the avails or income from the conduct of such commerce."

United States Express Co. v. Minn. 223 U. S. 335.

The capital or earnings, gross or net, of a corporation employed chiefly in interstate commerce may be taken as a mere measure or index to ascertain the local tax of the foreign corporation doing an interstate business upon its property its business in the state levying the tax.

Baltic Mining Co. v. Mass. 231 U. S. 68, 83.

Wells Fargo Co. v. Nev., 248 U. S. 165, 7.

Such a tax is not a tax upon the property engaged in, or the earnings derived from interstate commerce; those merely help measure the value of the property or the business of the foreign corporation in the locality of the tax from which the proper tax is ascertained.

Cudahy Packing Co. v. Minn. 246 U. S. 50, 454.

Flint v. Stone Tracy Co. 220 U. S. 108, 163.

A tax so measured does not unnecessarily burden commerce and does not tax property outside the jurisdiction imposing the tax.

Ohio Tax Cases, 232 U. S. 576.

97 As we understand the opinion of the court it finally holds that the state may tax "some fractional part of the net income of a foreign corporation engaged in interstate commerce, provided

that the apportionment is made dependent in fact on the value of its property situated within the state, that the amount of the tax is not excessive regarded as a tax on property within the state, and that there is no discrimination against interstate commerce in the apportionment or enforcement of the tax."

All of the net income may be taken as the measure of a tax upon the value of the property of a foreign corporation in a state where it is doing a local business.

With this qualification I am in substantial accord with this proposition.

With that part of the opinion upholding this tax as a privilege tax, as a tax on the privilege of doing business in a corporate capacity in this state, I am not in accord. As a privileged tax as such the tax cannot be sustained.

If the purpose and effect of our statute was to make the tax dependent upon the value of its property here as a going concern and to measure the tax by the entire net income I should readily agree that the tax was valid. But whatever its purpose its effect is not this. And in the final analysis the real difference between the majority and minority of the court is in the holding that the apportionment of this tax is in fact made dependent on the value of its property within our state.

The tax should be proportioned to the value of the property and business in our state for it is to these our state affords protection.

98 The entire net income of a corporation is taxable at its domicile. But that does not prevent Connecticut from levying a tax for the protection it affords to the local business of the plaintiff and using the entire net income to measure this by.

The value of the property here must limit the tax here, otherwise the tax would be laid on property outside our state and as a consequence burden interstate commerce.

"It is, of course, entirely settled that a state cannot, consistently with the Federal control of interstate commerce, lay such taxes, either upon property rights or upon franchises or privileges as in effect either directly or by its necessary operation to burden such commerce."

International Paper Co. v. Mass. 246 U. S. 135.

Ohio Tax Cases, 232 U. S., 576, 593.

U. S. Exp. Co. v. Minn. 223 U. S. 335, 344.

Western Union Tel. Co. v. Kansas, 216 U. S. 1.

Similarly it follows that the income earned by property of the corporation outside of Connecticut cannot be taxed here.

To tax this income would be to tax property without our jurisdiction and over which our state never acquired jurisdiction and for which it never furnished protection.

The net income of the plaintiff from the goods sold came in part from the work, material, management and capital at its factory plant, and in part from the maintenance of its branches, the sale of its goods, the collection of its accounts, the financing of its busi-

ness and the maintenance of its purchasing department, and all of these were without this state.

Each state where the various parts of this extensive business were carried on had the right to tax the net income from the business earned by that part of the business transacted within it.

99 The goods manufactured in our state and sold outside were taxable here upon their value then; or upon the proportion of the gross or net income which the goods made here had earned. American Mfg. Co. v. St. Louis, 250 U. S. 459, 463.

Rentals obtained outside Connecticut upon goods made here cannot be taxed here.

Profits from repairs of machines made outside our State cannot be taxed here.

Sales of goods purchased and sold outside the state, never having been a part of the business done here nor the profits made thereon cannot be taxed here.

Dividends, discounts and interest earned outside the state cannot be taxed here.

The net income resulting from the care and sale of goods in another jurisdiction which were made here cannot be taxed here.

16% of the gross profits were made elsewhere and clearly are not taxable here.

As to the balance we do not know the exact net profits earned here and elsewhere. But we know that the expenses outside the state were nearly twice the manufacturing cost in Connecticut.

It is common knowledge that the selling and commercial side of any manufacturing business costs more than the manufacturing side, and the profits to that side are correspondingly greater. But if we consider them on a parity and proportionate to their cost we find the net profits to the manufacturing side to be about 28 per cent of the total; to the sales side 56 per cent; to proceeds from rental, repairs, &c., outside Connecticut 16 per cent.

100 If the net profits approximated the gross profits Connecticut would be entitled to tax about \$400,000 of the net profits, under the rule adopted by the statute she taxed about \$600,000.

The portion of the net income upon which the tax is to be laid under our statute in the case of a company like the plaintiff deriving profits principally from the sale or use of tangible personal property is such proportion as the fair cash value of its real estate and tangible personal property in this state at the close of the fiscal year next preceding is to the fair cash value of its entire real estate and tangible personal property then owned by it.

In the case at bar the finding does not specifically detail all of the property of the plaintiff outside the state. But we know that it was a large amount, from the sale made, and we know that a business of its volume will have a large cash balance and open accounts and bills receivable, and patents and contracts, aggregating thousands and probability millions in value.

The interest earned, \$29,456, showed that the plaintiff carried a large cash balance. The dividends received indicated a substantial

investment account. These intangible assets enabled the plaintiff to do its business in Connecticut and to do a business outside of Connecticut, aggregating gross profits from rentals in the fiscal year of over \$600,000; from repairs of over \$452,000, and gross profits from merchandise of over \$190,000.

All of these elements of gross profits and the income from intangible assets earned outside the state helped make up the net income upon which the plaintiff's tax was measured.

101 Omitting the intangible property of the plaintiff outside of Connecticut diminishes the denominator of the fraction by which the proportion of the net income is found, and as a consequence, since the numerator remains stationary, gives to the state a greater proportion of the net income on which to levy the tax than it is entitled to, for this gives it a proportion of the net income earned by the assets outside our state.

The tax laid upon that part of the net income earned outside the state is a tax laid upon the property of a foreign corporation located outside the state and necessarily burdens commerce.

If the real estate and tangible personal property comprised all of the property of the plaintiff this proportion would ordinarily measure the tax without discrimination, and if the tax was general and not unreasonable in amount or rate it would approximate a fair result.

But the proportion of the statute holds although a substantial part, perhaps half or more, of the property from which the net income has been earned is outside the state. This is the vice of the statute. It permits taxes upon net income earned outside the state.

The majority opinion says the tax imposed in this case is insignificant, only 2/10 of 1% of the gross income, about \$12,000, and that such a sum for so great a corporation is a trifle.

I do not follow all of the mathematics of the opinion of the court. But whether the figures are correct or not is not important in this connection. The smallness of the tax does not make the tax constitutional if in fact it taxes property outside the state levying the tax.

102 Mr. Justice Vandeventer in *International Paper Co. v. Mass.*, 246 U. S. 135, 189, thus disposes of this point. "It is thus manifest on the fact of all of the cases that they in no way sustained the assumption that because a violation of the Constitution was not a large one it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution was treated as affording a measure of the duty of enforcing the Constitution."

The court rests its decision, so far as the commerce clause is concerned, upon *United States Glue Company v. Oak Creek*, 247 U. S. 321, which it assumes decides, "that under the form of a privilege tax, a state may tax some fractional part of the net income of a foreign corporation engaged in interstate commerce, provided that the apportionment is made dependent in fact on the value of the property situated within the state, that the amount of the tax is not excessive regarded as a tax on property within the state, and that

there is no discrimination against interstate commerce in the ad-measurement or enforcement of the tax."

I do not find this doctrine announced in this opinion. The Glue Company case does not, as I think, change or attempt to change the law which had become practically settled with *Western Union v. Kansas*, 216 U. S. and succeeding cases, upon whose authority this dissent is based.

The only point decided was thus stated by Mr. Justice Pitney on page 326, "Stated concisely the question is whether a state, levying a general income tax upon the gains and profits of a domestic corporation may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause, of the Constitution of the United States."

103 The issue concerned the commerce clause, and the due process clause issue also raised in this case is quite independent of the commerce clause.

International Paper Co. v. Mass., 246 Mass. 135.

The tax could have been sustained as an exercise of control over the net income of its own corporation by the state of its origin. It could have been sustained upon the specific provision of the statute.

"The tax shall be assessed * * * upon all income * * * provided, that any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state." This statutory exemption follows the decisions.

Our statute contains no such provision; and as it seems to me our court treats the case as if this provision were in our statute. And it fails to note the significance of the fact that the question at issue concerned a domestic corporation and did not concern the taxing of a foreign corporation upon profits received by it outside the jurisdiction of the state imposing the tax.

The Wisconsin tax on net income was one substantially in lieu of all other taxes except those on real estate. It included all other forms of property tax, and also all forms of excise tax.

The reasoning of Mr. Justice Pitney that the tax on the net income of this domestic corporation engaged in interstate business is an indirect burden upon commerce and hence valid does not
104 seem to be applicable to the tax on the net income of a foreign corporation arising from its interstate commerce. And certainly it can have no application to the net income of this corporation which was earned upon that part of the property or business located here.

We conceive that the fundamental justification for a tax upon the net income of a foreign corporation is that the income taxed is subject to the state's jurisdiction and that the tax laid does not hamper commerce.

The fact that the tax is merely an indirect burden on commerce will not save it if the property or income taxed be that of a foreign

corporation and the property be located or the income be earned, outside the state.

The language of Mr. Justice Pitney which the opinion of the court quotes and relies upon as decisive of this case should be read in connection with the entire opinion, and as read it should be remembered that it was said in reference to a domestic corporation and of a tax upon income derived from business transacted and property located within the state, and is to be applied to the sole question involved, whether the tax was a burden on commerce.

Read and applied as our court reads and applies the Oak Creek case as it seem to me, practically treats as overruled the authorities from *Western Union v. Kansas*, 216 U. S. 1, down.

All taxes upon a foreign corporation engaged in local business outside its domicile are indirect burdens on commerce. When levied on property physically within the state or imposed upon the privilege of doing business in the state, or levied upon the value of property of the corporation within the state such taxes may be
105 valid exactions. And when levied upon property outside a state, or the tax exaction is unreasonable, they are invalid, and it makes no difference whether the measure of the tax be net income or gross income.

The tax on the net income in *Peck & Co. v. Lowe*, 247 U. S. 173, was a tax upon the net income of a domestic corporation so far as the United States was concerned, by the country of its domicile. And the tax upon the net income of the United States Glue Company was a tax upon the net income of a domestic corporation by the state of its domicile.

There can be no violation of the commerce clause by a tax laid on the net income of a corporation by the state or country of its domicile. All of such income must respond to the valid exactions of government.

A tax on net income of a foreign corporation proportioned to the earnings in the state of the tax does not burden commerce. When the tax goes beyond this and taxes earnings made outside that state it is a tax upon property outside its jurisdiction and violates the due process clause and as a consequence necessarily burdens commerce.

The authorities from *Western Union Tel. Co. v. Kansas*, *supra*, left the subject of taxation, always difficult and somewhat obscure, reasonably clear, and I find it hard to persuade myself as my brethren seem to think, that there has been a determination to substitute a new theory of the indirect burden of the net income tax for the doctrine of those cases.

A tax by a state on the gross income or the capital as such of a foreign corporation necessarily burdens commerce and taxes property outside the state.

The same holding must in logic follow as to net income.
106 "A tax upon a corporation may be proportioned to the income received as well as to the value of the franchise granted or the property possessed."

The Delaware Railroad Tax, 13 Wall, 206.

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I am of the opinion that questions 1 and 2 upon which our advice is asked should be answered "Yes."

The foregoing is a true copy of the original dissenting opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judge until printed in the official reports.

JAMES P. ANDREWS,
Reporter,

Per W. E. C.

(Endorsements.)

18765. Underwood Typewriter Co. vs. Frederick S. Chamberlain, Treasurer. Third Judicial District (Transferred from First Judicial District), Hartford County, June Term, 1919. Wheeler, J. (dissenting). Filed Nov. 24, 1919. George A. Conant, Clerk.

107 Superior Court of the State of Connecticut, County of Hartford.

I, George A. Conant, Clerk of said Court, do hereby certify that the foregoing pages, numbered from 1 to 106 inclusive, are a true, full and complete transcript of the record and proceedings in No. 18765, The Underwood Typewriter Company vs. Frederick S. Chamberlain, Treasurer, as the same now appear on file in my office.

In Witness Whereof, I have hereunto set my hand and the seal of said Court at my office, in Hartford, in said county and state, this 20th day of December 1919.

[Seal Superior Court Hartford County, Ct.]

GEORGE A. CONANT,
Clerk.

108 Superior Court of the State of Connecticut, Hartford County, November 24, 1919.

THE UNDERWOOD TYPEWRITER COMPANY

vs.

FREDERICK S. CHAMBERLAIN, Treasurer.

Petition for Writ of Error.

To the Honorable Samuel O. Prentice, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut:

The Underwood Typewriter Company, the plaintiff in the above entitled cause, shows by this petition to this Honorable Court that in the records, proceedings and decision in the Superior Court, Hart-

ford County, following the advice and opinion of the Supreme Court of Errors of the State of Connecticut, the same being the highest court of said state in which a decision could be had in this suit, a manifest error has occurred greatly to the damage of said The Underwood Typewriter Company.

That as appears in the record and proceedings there was involved in question the following:

(1) Whether or not under said pleadings and said agreed finding of facts, and in respect to The Underwood Typewriter Company, the portion of the statute providing for the return and tax and the assessment and apportionment thereof under and in accordance with Sections 19 to 23 inclusive of Chapter 292, Public Acts of 1915, is in violation of the provisions of the Constitution of the United States, in that it constitutes a tax or burden on interstate commerce contrary to Section 8 of Article 1, and upon the net income of business and sales made outside the state contrary to the Fourteenth Amendment to said Constitution.

(2) Whether or not the amount assessed upon The Underwood Typewriter Company under said sections of Chapter 292 of the Public Acts of 1915 is illegal and excessive for the reason that it is based not only upon the net income of the corporation from its business within the state of Connecticut, but upon the net income of the corporation from its business both within and outside the state.

109 All of which fully appears in the records and proceedings of the case and as specifically set forth in the assignment of errors filed herewith.

Wherefore your petitioner prays that a writ of error be allowed and that a transcript of the record, proceedings and papers upon which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of such Court in such cases made and provided.

THE UNDERWOOD TYPEWRITER COMPANY,
By SHIPMAN & GOODWIN,

Its Attorneys.

[Endorsed:] State of Connecticut, Superior Court, Hartford County. The Underwood Typewriter Company vs. Frederick S. Chamberlain, Treasurer. Petition for Writ of Error.

110 Superior Court of the State of Connecticut, Hartford County,
November 24, 1919.

THE UNDERWOOD TYPEWRITER COMPANY

VS.

FREDERICK S. CHAMBERLAIN, Treasurer.

Assignment of Errors.

Now comes The Underwood Typewriter Company, plaintiff in the above entitled action, and files herewith its petition for a writ of error and says there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

1. The Court erred in holding that the provisions of Sections 19 to 23 inclusive of Chapter 292, Public Acts of 1915 of the State of Connecticut, (now Sections 1391 to 1395 inclusive of Chapter 73 of the General Statutes of Connecticut, Revision of 1918) are not in conflict with and in violation of the provisions of Section 8 of Article I of the Constitution of the United States, for that the State of Connecticut by and through the provisions of said statute for the assessment and apportionment of the tax places a tax or burden on interstate commerce equivalent to a regulation thereof.

2. The Court erred in holding that the provisions of said statute were not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States for that said State by and through the provisions of said statute assumes and seeks:

(a) To deprive the plaintiff in error of rights, privileges and immunities secured to other citizens of the United States and of the ~~and seeks~~ *said state;*

(b) To deprive the plaintiff in error of property without due process of law;

(c) To deny to the plaintiff in error the equal protection of the law in that said statute imposes a tax upon income of business and sales made outside of said State and upon property located without said State.

111 For which errors the said plaintiff in error, The Underwood Typewriter Company, prays that the judgment of said Superior Court, dated October 10, 1919, be reversed, and judgment entered for the plaintiff in error, and for costs.

THE UNDERWOOD TYPEWRITER
COMPANY.

By SHIPMAN & GOODWIN,

Its Attorneys.

[Endorsed:] State of Connecticut, Superior Court, Hartford County. The Underwood Typewriter Company vs. Frederick S. Chamberlain, Treasurer. Assignment of Errors.

112 Superior Court of the State of Connecticut, Hartford County, November 24, 1919.

THE UNDERWOOD TYPEWRITER COMPANY

VS.

FREDERICK S. CHAMBERLAIN, Treasurer.

Order of Allowance of Writ of Error.

Before the Honorable Samuel O. Prentice, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut:

On this 2nd day of December, 1919, the application of The Underwood Typewriter Company, plaintiff in this action, for a writ of error came on to be heard, said plaintiff being represented by counsel, and it appearing to the Court from the petition filed herein, and from the record filed therewith that its application should be granted, and that a transcript of the record, proceedings and papers upon which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed, in order that such proceedings may be had as may be just.

Now therefore

It is ordered that a writ of error be allowed, bond having been furnished by the plaintiff, conditioned according to law, in the sum of \$500, and that a true copy of the record, assignment of errors, and all proceedings in the case in the Superior Court of Connecticut shall be transmitted to the Supreme Court of the United States, duly certified according to law, in order that said Court may inspect the same and take such action thereon as it deems proper according to law.

SAMUEL O. PRENTICE,

*Chief Justice of the Supreme Court of Errors
and Presiding Judge of the Superior Court
of the State of Connecticut.*

[Endorsed:] Superior Court of the State of Connecticut, Hartford County, November — 1919. The Underwood Typewriter Co. vs. Frederick S. Chamberlain, Treas. Order of allowance of writ of error.

113 Know all men by these presents:

That We, the Underwood Typewriter Company as principal and United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto G. Harold Gilpatric, as he is Treasurer of the State of Connecticut, in the full and just

sum of Five Hundred Dollars (\$500) to be paid to the said G. Harold Gilpatric as said Treasurer, his successors or assigns, to which payment well and truly to be made, we do hereby bind ourselves, our successors and assigns by these presents.

Sealed with our seals and dated this 29th day of November, A. D. 1919.

Whereas, at a term of the Superior Court for Hartford County in the State of Connecticut, in a suit depending in said Court between the said The Underwood Typewriter Company and Frederick S. Chamberlain, Treasurer, a final judgment was rendered against the said The Underwood Typewriter Company, and the said The Underwood Typewriter Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said G. Harold Gilpatric, Treasurer, citing and admonishing him to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof.

Now, Therefore, the condition of the above obligation is such that if the said The Underwood Typewriter Company shall prosecute its said writ of error to effect and answer all damages and costs if it fail

to make its plea good, then the above obligation to be void,
114 otherwise to remain in full force and virtue.

UNDERWOOD TYPEWRITER
CO., INC.,

D. W. BERGEN,

Treas. [L. S.]

UNITED STATES FIDELITY
AND GUARANTY COMPANY,

Baltimore, Maryland.

By LOUIS R. BURTON, [L. S.]

Its Attorney-in-fact.

[L. S.]

Signed, sealed and delivered in the presence of
M. WARREN BERK.

It is agreed that the surety on this bond is satisfactory.

JAMES E. COOPER,

Of Counsel,

FRANK E. HEALY,

Attorney General,

Attorneys for Defendant in Error.

Bond Approved December 2nd, 1919.

SAMUEL O. PRENTICE,

*Chief Justice of the Supreme
Court of Errors and Pre-
siding Judge of the Super-
ior Court of the State of
Connecticut.*

[Endorsed:] State of Connecticut Superior Court. The Underwood Typewriter Co. vs. Frederick S. Chamberlain, Treas. Bond.

115 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Superior Court of the State of Connecticut Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, following the advice and opinion of the Supreme Court of Errors of the State of Connecticut, the same being the highest court of law or equity of said State, in which a decision could be had in the said suit between The Underwood Typewriter Company and Frederick S. Chamberlain, Treasurer, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaty or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said The Underwood Typewriter Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid,

116 with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court of the United States at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 2nd day of December, in the year of our Lord one thousand nine hundred and nineteen.

C. E. PICKETT,

Clerk, District Court United States District of Connecticut.

Allowed, December 2nd, 1919.

SAMUEL O. PRENTICE.

Chief Justice, Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut.

[Endorsed:] Supreme Court of the United States, October term, 1919. The Underwood Typewriter Co., Plaintiff in error vs. Frederick S. Chamberlain, Treas., Defendant in error. Writ of error.

117 Superior Court of the State of Connecticut, Hartford County.

I, George A. Conant, Clerk of said Court, do hereby certify that there was lodged with me as such clerk on December 17, 1919, in No. 18765, The Underwood Typewriter Company vs. Frederick S. Chamberlain, Treasurer.

1. The original bond, of which a copy is herein set forth.
2. Copy of the writ of error as herein set forth to file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Hartford in said County and State, this 20th day of December, 1919.

[Seal Superior Court, Hartford County, Ct.]

GEORGE A. CONANT,
Clerk.

118 UNITED STATES OF AMERICA, ss:

To G. Harold Gilpatric, Treasurer of the State of Connecticut, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the Superior Court for Hartford County, State of Connecticut, wherein The Underwood Typewriter Company is plaintiff in error, and Frederick S. Chamberlain, Treasurer, is defendant in error, to show cause if any there be, why judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Samuel O. Prentice, Chief Justice of the Supreme Court of Errors and Presiding Judge of the Superior Court of the State of Connecticut, this 2nd day of December, in the year of our Lord one thousand nine hundred and nineteen.

SAMUEL O. PRENTICE,
*Chief Justice of the Supreme Court of
Errors and Presiding Judge of the
Superior Court of the State of Con-
necticut.*

Hartford, Conn., December 9th, 1919.

We, attorneys of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

FRANK E. HEALY,

Attorney General.

JAMES E. COOPER,

Attorneys for Defendant in Error.

[Endorsed:] State of Connecticut, Superior Court. The Underwood Typewriter Co. vs. Frederick S. Chamberlain, Treas. Citation.

119 Superior Court of the State of Connecticut, Hartford County.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Superior Court at Hartford in said County and State, this 20th day of December, 1919.

[Seal Superior Court, Hartford County, Ct.]

GEORGE A. CONANT,

Clerk.

Endorsed on cover: File No. 27,408. Connecticut Superior Court. Term No. 653. The Underwood Typewriter Company, Plaintiff in Error, vs. Frederick S. Chamberlain, Treasurer of the State of Connecticut. Filed December 31st, 1919. File No. 27,408.

APR 15 1920

JAMES D. MAHER,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES

THE UNDERWOOD TYPEWRITER
COMPANY, Plaintiff in Error,

v.

FREDERICK S. CHAMBERLAIN,
Treasurer,
Defendant in Error

October Term, 1919.

No. 653.

MOTION TO ADVANCE ARGUMENT

Now comes Underwood Typewriter Company, Plaintiff in Error, and shows to this Court that the above-entitled cause involves the question of the constitutionality of Sections 19-23 inclusive of Chapter 292 of the Public Acts of 1915 of the State of Connecticut, known as the Miscellaneous Corporation Income Tax Law as being in violation of Section 8 of Article I of, and the Fourteenth Amendment to, the Constitution of the United States, so far as the same affects corporations foreign to Connecticut and doing business therein as interstate commercial agencies, and moves this Court to advance said cause on the docket, and for special reasons of said motion alleges:

1. The Plaintiff in Error is a Delaware corporation, having its principal commercial office in New York City, where its large sales activities are managed. They enter every country on the globe through subsidiary corporations bearing the same name. It maintains two small commercial offices in Connecticut where orders are taken for transmittal to the home office in New York for approval and fulfillment. The sole manufacturing plant of the Plaintiff in Error is at Hartford, Connecticut, although it repairs typewriters the world over. It operates its Hartford plant by directions from New York, sending funds to Hartford for that purpose. Certain of its goods never reach Connecticut in any form

whatever, while forty-seven per cent. in value of its real estate and tangible personal property is located in Connecticut.

The sections of the law in question are printed as a supplement to this motion. Thereby the Plaintiff in Error is required to pay a tax annually to the Federal Commissioner of Internal Revenue for its fiscal or calendar year next preceding. It is required to file with the Tax Commissioner of Connecticut a copy of its last federal income tax return. It is also required to state the amount of taxes paid upon its net income to the federal government for the preceding year. In case it carries on business outside the state, it is required to state

(a) The fair cash value of its real estate and tangible personal property in each town in Connecticut, and

(b) The fair cash value of its entire real estate and tangible property wherever located.

The tax is two per cent. of the net income upon which the federal tax is imposed apportioned as the value of property (a) above is to the value of property (b) above.

The law makes no distinction whatever as to the source of the corporation's income, whether from intrastate, interstate or foreign dealings. Its measuring rod of the income which Connecticut is entitled to tax is the comparative value of the corporation's real estate and tangible personal property within the state to the value of such property everywhere. Receivables, letters patent, trade marks, good will, borrowed capital, etc., which are income producing are entirely eliminated. There is no distinction between domestic or foreign corporations, nor whether income is derived from dealings in property which was never within the jurisdiction of Connecticut, which was at some time within the State or which is always within the State.

The capital assets of the Plaintiff in Error were about \$14,800,000; its net income \$1,336,586.13, of which only

\$42,942.18 was collected in Connecticut. Of its total assets only about one-half, viz.: \$6,320,982.78 was in real estate and tangible personal property, of which 47 per cent. was allocated to Connecticut.

2. The fundamental claim of the Plaintiff in Error is this:

However broad may be the field of federal taxation, that of the states, by their constitutional grant to the federal government is limited to property rights, privileges and franchises within the jurisdiction of the taxing states. Unless such limitation is recognized as binding on the states themselves, the United States of America is not a union, but a mere congery of separate sovereignties.

3. It is most important, as Plaintiff in Error believes, that the question at issue in this cause be speedily determined. The law in question has brought in a large revenue to the State since the enactment, amounting to \$2,000,000.00 per year, on the average. If the law is held to be unconstitutional Connecticut will be obliged to make other financial arrangements.

4. The Plaintiff in Error, as well as several other corporations, has causes under said law now pending in the Superior Court of Connecticut owing to the fact that the law requires payment of the tax according to its provisions and application for refund to be made thereafter.

UNDERWOOD TYPEWRITER COMPANY,

Plaintiff in Error, by

ARTHUR L. SHIPMAN,

Its Attorney.

SUPPLEMENT.

STATE OF CONNECTICUT.

PUBLIC ACTS OF 1915.

CHAPTER 292.

PART IV.

MISCELLANEOUS CORPORATIONS.

SEC. 19. The term "company" as used in this part shall include every corporation, joint stock company, or association carrying on business in this state which is required to report to the collector of internal revenue for the district in which such company has its principal place of business for the purpose of the assessment, collection, and payment of an income tax, except insurance and trust companies, state banks, savings banks organized under the laws of this state, banking institutions organized under the laws of the United States and located in this state, express companies carrying on business on steam or electric railroads or street railways, steam or electric railroad or street railway corporations, companies whose principal business in this state is furnishing, leasing, or operating dining, sleeping, chair, parlor, refrigerator, oil, stock, fruit, or other cars, corporations whose principal business is manufacturing, selling, and distributing illuminating or heating gas, or electricity to be used for heat, light, or motive power, or water for domestic or power purposes, telegraph, cable, and telephone companies.

SEC. 20. Each such company, except as provided in section nineteen, shall pay a tax annually to the state upon the net income for its fiscal or calendar year next preceding, as

hereinafter provided, upon which income such company is required to pay a tax to the United States. Such company subject to the tax imposed under part four shall render to the tax commissioner, on or before the first day of April of each year, under oath or affirmation of its president, vice-president, or other principal officer, and of its treasurer or assistant treasurer, a true copy of the last return made to the collector of internal revenue, of the annual net income arising or accruing from all sources in its fiscal or the calendar year next preceding, stating:

(1) The name and location of the principal place of business of such company, the state under the laws of which organized, and the date thereof; the kind of business transacted and a list of all subsidiary companies, if any, with the location of the principal place of business of each; (2) the amount of its paid-up capital stock outstanding, or if no capital stock, its capital employed in business, at the close of the year; (3) the total amount of its bonded and other indebtedness at the close of the year; (4) the gross amount of its income, received during such year from all sources, and, if organized under the laws of a foreign country, the gross amount of its income received within the year from business transacted and capital invested within the United States; (5) the amount of its ordinary and necessary expenses paid out of earnings in the maintenance and operation of the business and properties of such company, stating separately all rentals or other payments required to be made as a condition to the continued use or possession of property, and, if organized under the laws of a foreign country, the amount so paid in the maintenance and operation of its business within the United States; (6) the amount of losses sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property; (7) the amount of interest accrued and paid within the year on its bonded or other indebtedness not exceeding one-half of the sum of its interest-bearing indebtedness and its paid-up capital stock, outstanding at the close of the year, or if no capital stock, the amount of interest paid within the year on an amount of indebtedness not exceeding

the amount of capital employed in the business at the close of the year, or in case of a company organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded or other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, or if no capital stock the amount of capital employed in the business at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States bears to the gross amount of its income derived from all sources within and without the United States; (8) the amount paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, and, separately, the amount so paid by it for taxes imposed by the government of any foreign country; (9) the net income of such company after making the deductions authorized; (10) the amount of taxes paid upon its income to the internal revenue department for the year next preceding the one for which such return is made; (11) in case of a company which carries on business outside the state, the fair cash value of its real estate and tangible personal property in each town in this state, and the fair cash value of its real estate and tangible personal property located outside this state; (12) in case of a company deriving profits principally from the holding or sale of intangible property the gross receipts from its business within and without this state and the gross receipts from its business within this state.

SEC. 21. If the amount of the annual net income as returned by each such company to the collector of internal revenue is changed or corrected by the commissioner of internal revenue or by other official of the United States, such company, within ten days after receipt of notification of such change or correction, shall make return under oath or affirmation to the tax commissioner of such changed or corrected net income upon which the tax is required to be paid to the United States. If any deduction is made from the net income as returned, the comptroller shall draw his order in favor of such company on

the treasurer, on the voucher of the tax commissioner for the amount of any tax paid upon such deduction, or if any addition is made, such company shall, within thirty days after receipt of notice from the tax commissioner of the amount of such addition, pay the tax thereon:

SEC. 22. If such company carries on business outside of this state, a portion of the net income on which the tax is imposed by the United States shall be apportioned to this state as follows: In case of a company deriving profits principally from the ownership, sale, or rental of real estate, and in case of a company deriving profits principally from the sale or use of tangible personal property, such proportion as the fair cash value of its real estate and tangible personal property in this state on the date of the close of the fiscal year of such company in the year next preceding is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deduction on account of any incumbrance thereon; in case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its gross receipts in this state for the year ended on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the state.

SEC. 23. The tax commissioner, on or before the first day of July in each year, shall make a list of companies subject to the tax upon their net incomes, with the amount of such net incomes taxable in this state, determined as aforesaid, and a tax is hereby laid on each such company of two per centum of such net income, and the tax commissioner shall enter the amount of such tax against the name of each such company. He shall certify to the correctness of such list and said amounts, and deliver a copy thereof to the treasurer, who shall collect such tax in the manner and with the powers provided in the general statutes for the collection of taxes in towns. The tax commissioner shall forthwith mail a statement of the amount of such tax to each such company, but failure to receive such statement shall not excuse nonpayment of such tax. Such tax shall be payable

on or before the first day of August in such year, and to any sum or sums due and unpaid after the first day of August in any year, after ten days' notice and demand thereof by the treasurer, shall be added the sum of five per centum on the amount of any tax unpaid, and interest at the rate of three-fourths of one per centum per month upon such tax from the time the same became due, provided, in case of failure to make such return, or in case of false or fraudulent return, the tax commissioner, upon discovery thereof at any time within three years after the same is due, shall make a return of such taxable net income, and the tax thereon shall be paid by such company upon notification of the amount thereof. Such tax, if unpaid, shall constitute a lien upon the real estate of such company within this state, such lien to be in force from the filing of a certificate, signed by the treasurer, in the land records of the town wherein such real estate is situated until such tax and interest is paid.

No. 653

FILED

MAR 22 1920

JAMES D. MAHER,
CLERK

IN THE SUPREME COURT OF THE UNITED
STATES

THE UNDERWOOD TYPEWRITER
COMPANY, Plaintiff in Error,

v.

FREDERICK S. CHAMBERLAIN,
Treasurer of the State of
Connecticut,
Defendant in Error.

No. 27,408,

October Term, 1919,
March 1st, 1920.

Statement of the Defendant in Error in opposition to the
motion of the Plaintiff in Error to advance the argu-
ment.

This action was instituted by writ dated September 26,
1916, which was returnable to the Superior Court for Hart-
ford County, Connecticut, in November, 1916. Through no
delays caused by the Defendant in Error the action was not
brought and filed in the United States Supreme Court until
December 31st, 1919, and the record has only very recently
been printed and placed in the defendant's hands.

The Defendant in Error would join in an application
for the argument of this action at the opening of the October
Term, 1920, but it would be a hardship amounting to a prac-
tical impossibility to properly prepare and present the case
prior to that time for the following reasons:

The former Attorney General of the State of Connecticut,
who was the chief counsel in said action, and who tried and
argued said action in the prior hearings, has since been ap-
pointed a Judge of the Superior Court and is no longer
counsel in this action.

One of the counsel who has been designated to act for the Defendant in Error was on January 5th, 1920, and before his appointment as counsel in this case, appointed Special Assistant to the Attorney General to assist in the trial of the case of *United States v. Rumely et al*, which opens in the United States Court for the Southern District of New York on April 13th, 1920, and it is expected that the New York case will occupy his undivided attention during the entire spring term of Court.

In view of the fact that this action has been long pending and that the circumstances above set forth have arisen, the Defendant in Error respectfully requests that said action be not advanced for immediate argument and be not set down for argument prior to the fall term, 1920.

Respectfully submitted,

Defendant in Error, by

HUGH M. ALCORN

Of Counsel.

SET OFF
JAMES O. BAKER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 314.

THE UNDERWOOD TYPEWRITER COMPANY,

Plaintiff in Error,

against

FREDERICK S. CHAMBERLAIN, Treasurer of the State of
Connecticut,

Defendant in Error.

BRIEF AND ARGUMENT ON BEHALF OF THE PLAINTIFF-IN-ERROR.

CHARLES STRAUSS,
ARTHUR L. SHIPMAN,
ARTHUR M. MARSH,
EUGENE D. BOYER,

of Counsel for Plaintiff in Error.

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Supreme Court of the United States

THE UNDERWOOD TYPEWRITER
COMPANY,
Plaintiff-in-Error,

vs.

FREDERICK S. CHAMBERLAIN,
Treasurer of the State
of Connecticut,
Defendant-in-Error.

October Term
A. D. 1920.
No. 215.

BRIEF AND ARGUMENT ON BEHALF OF THE PLAINTIFF-IN-ERROR.

Statement of the Case.

This is a writ of error to the Superior Court, Hartford County, State of Connecticut, to reverse a judgment entered upon the advice of its Supreme Court of Errors on a reservation of questions submitted. Such judgment is a final decision of the highest Court of the State, having jurisdiction.

Clarke's Appeal from Probate, 70 Conn., 483.

The plaintiff-in-error, hereinafter called the plaintiff, is a corporation organized under the laws of

the State of Delaware, having its home office at Wilmington, in that State, its main office in New York City, and is engaged in the business of manufacturing typewriters and other machines, and in selling typewriters and typewriting material and accessories, and in repairing and renting such machines. Its business extends over numerous States of the Union and foreign countries, and is entirely directed from its offices in the City and State of New York.

The question involved concerns the validity of legislation of the State of Connecticut, by virtue of which a tax was laid and collected, against the protest of plaintiff, amounting to \$12,593.37. This legislation was Chapter 292, Public Acts of 1915, and consisted of five parts, of which Part IV related to Miscellaneous Corporations, among which plaintiff is included. The Act is printed in full in the appendix.

The tax involved was laid upon net income of the plaintiff for the calendar year 1915, and the present litigation is entirely with reference to the 1915 statute. In form, the case arose by application to the Superior Court in the nature of an appeal, under Sections 27 and 28, and thence by reservation for the decision of the Supreme Court of Errors, which upheld the tax by a divided Court.

Underwood Typewriter Co. v. Chamberlain, 94 Conn., 47; *Wheeler, J.*, dissenting, 94 Conn., 66.

A preliminary aspect of the same case was decided by the Connecticut Supreme Court and will be found in 92 Conn., 199.

The tax laid and collected was two per cent. "*upon the net income*" (Sec. 20), upon which income the plaintiff is required to pay a tax to the United States of two per cent. or "*of such net income*" (Sec. 23). Out of the total net income of plaintiff, namely, \$1,336,586.13, the two per cent. tax was applied to \$629,668.50 as the portion of the total net income apportioned to Connecticut under Section 22 of the Act. The last named sum is that part of the total net income from all sources which is the proportion of the "fair cash value of its real estate and tangible personal property in this State on the date of the close of the fiscal year of such corporation in the year next preceding, to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deduction on account of any encumbrance thereon."

In other words, the assumption of the legislation is that the proportion of the corporation's tangible assets in Connecticut on a given date, whether used in the business or not, to its tangible assets everywhere, whether used in the business or not, determines the amount of the net income during the entire year which is derived from, or to be ascribed to, the State of Connecticut.

The actual value, either in the market or for the purposes of the corporation, does not figure; and there is no opportunity, under the statute, to determine its actual value. The tax is not laid upon its value nor upon its use either in the plaintiff's business or otherwise. If, moreover, all the tangible assets of the corporation on January 1, 1916, had happened to be in Connecticut, then the tax would have been two per cent. of the entire net income, regardless of the quantity or

value of its intangible assets, and regardless of the value of local business in Connecticut, local business in other States, or of interstate business (Sec. 22).

The return of plaintiff pursuant to the Act, as set out in the stipulated facts (Record, p. 40), showed the following:

Real estate and tangible personal property in Connecticut	\$2,977,827.67
Real estate and tangible personal property outside of Connecticut	3,343,155.11

The ratio of the value of the physical or tangible property in Connecticut to the total is 47 per cent.

The tangible property in Connecticut was a factory at Hartford and its machinery and merchandise in course of manufacture, plus a certain quantity of typewriters and similar machines in plaintiff's branch offices in Hartford and New Haven.

The tangible property outside of Connecticut consisted of plaintiff's stock in numerous branches in other States and in foreign countries, made up in part of typewriters manufactured at the Hartford plant, and in part of other machines, accessories and supplies, adding machines, etc., a large portion of which were purchased by plaintiff outside of Connecticut from independent manufacturers.

The other assets of the corporation consisted of bills and accounts receivable, deposits in bank (principally in New York City, but also in other banks located in the same cities as its branch offices and show rooms), shares of stock of independent

corporations, good will, patents, trade marks, etc. (Record, p. 21). The value of such intangible assets does not appear in the record by express valuation, but its income from dividends was \$8,288.19 (Record, p. 24); from interest, \$29,456 (Record, p. 24); from discounts, \$14,627.36 (Record, p. 24), and from the total of these items, namely, \$52,371.55, a fair estimate of the value of that part of its intangible assets may be formed. These items were derived from business outside of Connecticut (Record, p. 24). The value of intangible assets also appears from the difference between the value of its physical assets, \$6,420,982.78, and its paid up capital stock, \$13,000,000, plus its borrowed money, a total of \$14,806,892.80, such difference being \$7,375,910.02.

It further appears from the tabulation in the stipulated facts (Record, p. 24) that out of its entire net income, namely, \$1,336,586.13, the net profits derived from transactions outside of Connecticut were \$1,293,643.95, and from corresponding transactions within the State but including rental from real estate in Connecticut of \$44,400, its net profits were only \$42,492.18.

A general description of the method of doing business by the Underwood Typewriter Company as conducted on January 1, 1915, and ever since that date (Record, p. 20), is as follows:

(a) It maintains its sole manufacturing plant in the City of Hartford, State of Connecticut, although it maintains small establishments for the repair of typewriters at its branch offices or agencies, which are located all over the United States and in foreign countries.

(b) It maintains branch offices and show rooms in every State within the United States and in many foreign countries, which branch offices and show rooms are conducted in the name of the plaintiff or the name of its subsidiary corporations bearing the same name, all the stock of which is owned by the plaintiff and which subsidiary corporations act as selling agents or factors for the plaintiff. It employs branch managers and salesmen who solicit orders for the sale and rental of typewriters and other products in the cities and towns where such branch offices and show rooms are located and in the vicinity thereof, from persons, partnerships and corporations residing or doing business in such cities, towns and localities. Such orders for the sale and rental of typewriters and other products so obtained are forwarded to the plaintiff's main office in the City of New York for approval and fulfillment. Thereupon the plaintiff's officials at its main office in said City of New York, direct its factory managers in Hartford to ship such typewriters and other products direct to the various branch offices for the purpose of making delivery to the purchasers and lessees thereof. The aforesaid managers of the Hartford factory, in compliance with said instructions, ship said typewriters and other products manufactured by the plaintiff through common carriers and similar means of communication, to such various branch offices and show rooms located in such other States and foreign countries to enable such branch offices to deliver such products to the plaintiff's customers and lessees. Such branch managers thereupon deliver to the purchasers and lessees such machines and products, collect the purchase price and rent

for the same when due, and deposit such moneys in the name of the plaintiff in a bank located in the city or town in which such branch offices and show rooms are located, in the said various States of the United States and foreign countries. The moneys so deposited in said banks in said various States and foreign countries may only be drawn out or paid out upon the check or draft signed by the treasurer of the plaintiff, whose main office is located in the City of New York. Shipments from the Hartford factory are also made direct to purchasers upon orders from the New York office.

(c) All machines and products which are rented are so rented to the lessees thereof under the terms of written leases between the plaintiff and the lessees executed at the place where such machines and products are delivered to the lessees thereof. The plaintiff also maintains, through its agents and representatives, at such various branch offices, repair shops, where for a consideration paid by the users of the machines and products manufactured by the plaintiff, such machines and products may be repaired.

Gross receipts from sales of typewriters to customers outside of Connecticut in 1915 were \$9,400,000; from rentals of machines to such customers, \$428,800; from repairs of machines outside of Connecticut, \$452,400; and from sales outside of Connecticut of property which was bought from others and never was in Connecticut (Record, p. 23, fols. 362, 400).

(d) All operating expenses of such branch offices and show rooms, including office rents and salaries of the various branch managers and salesmen, are paid by the plaintiff by checks and drafts by the

plaintiff upon the various banks located in the various States and foreign countries and signed by the treasurer of the plaintiff at the City of New York.

(e) The plaintiff also sells merchandise consisting of typewriter ribbons, desks, brushes, tools, oil cans, carbon papers and duplicating appliances, all of which it purchases for the purpose of sale, from individuals, co-partnerships and corporations disassociated from it and whose business is located outside the State of Connecticut. None of said articles are manufactured by it or within the State of Connecticut.

Funds are drawn by a check or draft signed by the plaintiff's treasurer, whose office is in New York (Record, p. 21). All operating expenses of the branch offices and show rooms are paid by the plaintiff by check issued from the New York office; and funds necessary for disbursement at the Hartford plant are forwarded from the New York office to Hartford for that purpose.

The operations in Connecticut, other than manufacture, consist of sales and rentals to Connecticut purchasers or lessees, and of repairing machines for Connecticut customers, shown by the following three items from paragraph 5 of the stipulated facts (Record, p. 23) :

Gross receipts from sales of company's products.....	\$129,125.41
Gross receipts from rentals of company's products.....	6,793.45
Gross receipts from repairing machines	7,301.32

Other items of sales and rentals within the State of Connecticut, shown by the same schedule, namely, sales of desks, furniture, and other accessories, are really interstate commerce, as this merchandise is bought outside of Connecticut and shipped to Connecticut customers. Including these items, the total intrastate business amounted to \$195,315.47 in gross receipts, \$99,326.62 in gross profits, \$42,942.18 in net profits.

In ratio to the total of gross receipts, gross profits, and net profits, Connecticut transactions amounted to about 1.74 per cent. of the gross receipts, 1.15 per cent. of the gross profits, and 3.2 per cent. of the net profits.

Assignments of Error.

Error is assigned (Record, p. 67) as follows:

(1) That the tax in question upon the net income of the plaintiff, a foreign corporation, violates the United States Constitution, Article 1, Section 8, in that the enforcement thereof places a tax or burden on interstate commerce, which amounts to a regulation thereof.

(2) That if the above proposition is not true, stated generally, such assessment and enforcement is a violation of Section 8 of Article 1, in that the allocation or apportionment of that part of the net income represented by the relative value of the tangible property of the plaintiff in Connecticut to the value of its total tangible property on that date and the taxation of the part so allocated, constitutes such a tax or burden, and amounts to an unlawful regulation of interstate commerce.

(3) That such assessment and enforcement upon the basis of such allocation or apportionment violates the Fourteenth Amendment to the Constitution of the United States, in that, without due process of law, business and income and property of the plaintiff which are without the territory and jurisdiction of the State of Connecticut are taxed.

(4) That such assessment and enforcement upon such an allocation or apportionment deprives the plaintiff of rights, privileges and immunities secured to it as a corporation existing under the laws of Delaware and as the owner of large permanent investments in Connecticut made prior to the adoption of the Connecticut legislation in question, and thereby violates the Fourteenth Amendment.

(5) That such assessment and enforcement upon such allocation or apportionment violates said Fourteenth Amendment by denying to the plaintiff the equal protection of the laws, in that a tax is thereby imposed upon business and sales of the plaintiff made outside of Connecticut, and upon property of the plaintiff located without said State.

The majority opinion of the Supreme Court of Errors held that the questions were controlled by the decision of this Court in *U. S. Glue Co. v. Oak Creek*, 247 U. S., 321 (Record, pp. 47-48). This was denied in the minority opinion and the decision of the *Oak Creek* case there put, as it seems to us, upon its true ground in relation to the facts and the law.

Importance of the Question Involved.

The importance of the question involved in this appeal cannot be too highly estimated. The enactment of the Federal Income Tax Law uncovered to the view of the respective States a fertile field for the collection of taxes from foreign corporations doing business in the respective States. By degrees the various States are seizing upon the opportunity to shift the greater burden of their local taxation upon these foreign agencies through the adoption of income tax acts with the Federal statute as a model, and even in some instances, as a part and parcel of their laws. Recognizing the necessity of avoiding an impost upon interstate commerce, these various State laws make provision for the allocation of some part of the total income of the taxpayer to the State.

In fixing the method of allocation, the various States have adopted differing formulae, each being suited to the peculiar industrial circumstances which are calculated to draw to the particular State the greater part of the income of the foreign taxpayer. Thus, New York, which is a commercial State, includes in its determination of the share of income to be allocated to it, a comparison of bills receivable within the State, with bills receivable everywhere. The reason for this is, that New York, perhaps, has more bills receivable within its borders than any other State in the Union. No doubt from ten to fifteen States could be named which, combined, have less bills receivable than has New York. On the other hand, Connecticut is a manufacturing State. Bills receivable within its domain are a negligible commodity, so Connecticut does

not include these in its fixation of its proportion of income. It takes for comparative purposes what it has the most of and excludes from the computation what it has least. Connecticut, with its abundance of manufacturing industries, confines its comparison to tangibles.

What is the consequence to a corporation such as this plaintiff, doing all its manufacturing in Connecticut and almost all of its commercial business in New York? The answer is that the laws of the two States allocate to themselves 100 per cent. or more of the income of a corporation situated as is this plaintiff. Yet the fact remains that the plaintiff does business in all the remaining States and in many foreign countries, and it undoubtedly earns income in each. At all events, it pays taxes in each, and in some of these, as in Massachusetts for instance, taxes are paid upon the theory that it earns income there. But if New York and Connecticut are correct, no income is earned in Massachusetts; and if Massachusetts is correct, some of the income which New York and Connecticut contend is earned within their respective boundaries is not so earned.

By the time all the States are lined up with income taxes with diversified methods of apportionment, in theory the total income will be earned a number of times over in the Eastern States, a goodly number of times in the Middle West and as many more times on the Western Coast and in the South. According to the diverse viewpoints of these ambitious States, no income will be realized in the boundaries of sister States. When that time arrives the respective States will still be wrong in theory but collectively they will be correct in fact,

for then there will be no income of the corporation at all. It all will be consumed by Federal and State taxes. It will be suggested that this is an exaggeration. But is it? Contemplate the result if forty-eight States in the Union adopt a tax of $4\frac{1}{2}$ per cent. upon the income, as New York has done, with each State following the example of Connecticut and New York in basing the apportionment upon a comparison of selected property elements in each instance chosen from the standpoint of what is likely to allocate the greater income to the State.

If each of the forty-eight States can find methods of apportionment as favorable to themselves as have Connecticut and New York, then every two States will consume 9 per cent. of the income in taxes. Multiplying this by twenty-four results in the consumption of 216 per cent. of the income, and the Federal Government tax is still to be considered.

In this connection it must not be assumed that New York and Connecticut have exhausted ingenuity in allocating income to themselves. Massachusetts too has its theories and an examination of them will reveal that it is as capable a self-provider as is New York or Connecticut.

It will undoubtedly be urged that contemplation over the probable injuries which commerce will suffer if other States follow Connecticut's taxation example is not an appropriate factor in the consideration of this case; that the questions involved must be determined without regard to what other States might do.

It is sufficient answer to note that this Court in applying its rule of judging the validity of such

acts by their effect has weighed the effect from the standpoint of similar statutes being enacted by other States.

Western Union v. Kansas, 216 U. S., 1, 37.

In the case cited, this Court says at page 37:

"It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits."

The *Western Union* case did not, of course, involve an income tax; State taxation of that nature on corporations was not then in vogue. But now it is quite the thing, for the impression prevails in the various States that a tax upon net income, whether reasonably apportioned or not, is immune from any of the prohibitive provisions of the Federal Constitution, which to date have protected large industries engaged in interstate commerce from being taxed out of existence by State legislation.

It requires no deep thought to observe that *unrestricted* State legislation imposing income taxes upon foreign corporations engaged in interstate commerce is a menace to the existence of our large industrial enterprises.

Technical or theoretical justification for the exercise of such *unlimited* powers by the States will not preserve interstate commerce or save the busi-

ness of the corporation engaged in it from confiscation; much less will it produce the wherewithal to pay the multitudinous taxes.

To paraphrase a well known remark, it is a condition with which this Court is confronted, not a theory.

That condition makes it imperative that a remedy be applied.

If a State taxes income *as such*, that is, as property, its right so to do should be limited to the income which is actually earned within its borders. If it taxes a franchise to do business with a portion of the net income as the measure of the tax, the apportionment should only be permitted to be made upon a comparison of all the elements within the State through which the income is earned with all such elements wherever located. The dropping out of one element by one State and another element by another State, and so on, necessarily works an injustice upon the taxpayer; and, additionally, in its operation necessarily fastens the tax upon income earned in interstate commerce and income earned and located without the State.

It is a fallacy upon its face to say that income is earned within a State on the basis of a comparison of tangibles located within its borders with tangibles located everywhere, for the tangibles alone do not earn the income. The same is true of a result obtained from a comparison of bills receivable only. Similarly, if a franchise is to be valued upon its income producing ability within the State, it is a fallacy to say that such an income is the proportion between tangibles or the proportion between receivables, for neither, standing alone, earn the income.

The absurdity of allocating income by a comparison of only one income producing element is demonstrated by a few illustrations from the record. Connecticut has taken unto itself 47 per cent. of the net income resulting from a gross receipt of \$452,409.26 in repairing typewriters outside of Connecticut (Record, p. 23).

Did the existence of the plaintiff's factory in Hartford in any wise contribute to this earning? Obviously not. It was earned through the expenditure of work and labor at the point where the repair was made. Similarly, the earning of dividends and interest and the securing of discounts bore no relation to the existence of tangibles in Connecticut. And by what conceivable turn of the human mind can it be reasoned that profits from the sale of desks, furniture and accessories purchased outside of Connecticut and sold outside of Connecticut, and the leasing of property permanently located out of Connecticut, arose through the existence of plaintiff's tangible property in Connecticut?

The gross receipts of the items referred to aggregate \$1,578,416.58 and Connecticut has taken 47 per cent. of the net income realized therefrom.

It should not be overlooked that the position of this Court with regard to such legislation as is involved in the case at bar is radically different from numerous cases involving taxation by States in the past. In much of the former litigation the conflict was whether the State should be allowed to tax a foreign corporation at all, or substantially that. The corporation was endeavoring to oust all jurisdiction of the State of that character. At present and in the case at bar, the conflict is rather between the various States than between any given

State and the particular corporation. With all the States rapidly falling into line in attempting, each of them, to reach as large a proportion as possible of the net income of the corporations, the only power which can protect and preserve the business corporations of the country, and save them from predatory State legislatures, which cannot be expected to restrain themselves to property within their own borders, is this Court.

We are not speaking of double taxation, which may, of course, occur without being preventable by this Court. We mean that State legislatures, supported by State courts, unless the line of their powers is sharply drawn and enforced by this Court, will tax not only the property within their jurisdictions, but property outside. If a State legislature commits palpable error in that respect, its own State court may perhaps be relied upon to set it aside, but in every State where there is a margin of doubt or a possibility of latitude of construction in favor of the State legislation, the State court will undoubtedly uphold it. The fences which mark the boundary lines can be fairly and properly set up and defended by this Court only.

A list of States having income taxes on corporations and a summary of their apportionment provisions appear in the appendix.

This, in reality, is a very old question.

Hamilton, in his essays and arguments urging the adoption of the Constitution, gave particular attention to commercial quarrels between the States, which might be expected unless the power to regulate interstate commerce was vested in the Federal Congress. He regarded excise taxes as remote and likely to produce little revenue, but he

foresaw, as he says, the imposition of taxes on new sources of revenue.

His fear that the States would engage in commercial war had reference mainly, as instruments of such war, to commercial regulations. He writes in Number VII of the *Federalist*, November 17, 1787, as follows:

“The competitions of commerce would be another fruitful source of contention. The states less favourably circumstanced, would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbours. Each state, or separate confederacy, would pursue a system of commercial polity peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed from the earliest settlement of the country, would give a keener edge to those causes of discontent, than they would naturally have, independent of this circumstance. We should be ready to denominate injuries, those things which were in reality the justifiable acts of independent sovereignties consulting a distinct interest. The spirit of enterprise, which characterizes the commercial part of America, has left no occasion of displaying itself unimproved. It is not at all probable, that this unbridled spirit would pay much respect to those regulations of trade, by which particular states might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations on one side, the efforts to prevent and repel them on the other, would naturally lead to outrages, and these to reprisals and wars.

The opportunities, which some states would have of rendering others tributary to them, by commercial regulations, would be impatiently submitted to by the tributary states. The relative situation of New-York, Connecticut, and New-Jersey, would afford an example of this kind. New-York, from the necessities of revenue, must lay duties on her importations. A great part of these duties must be paid by the inhabitants of the two other states, in the capacity of consumers of what we import. New-York would neither be willing, nor able to forego this advantage. Her citizens would not consent that a duty paid by them should be remitted in favour of the citizens of her neighbours; nor would it be practicable, if there were not this impediment in the way, to distinguish the customers in our own markets.

Would Connecticut and New-Jersey long submit to be taxed by New York for her exclusive benefit? Should we be long permitted to remain in the quiet and undisturbed enjoyment of a metropolis, from the possession of which we derived an advantage so odious to our neighbours, and, in their opinion, so oppressive? Should we be able to preserve it against the incumbent weight of Connecticut on the one side, and the co-operating pressure of New-Jersey on the other? These are questions that temerity alone will answer in the affirmative."

He again reverts to the subject in his Number XXII, December 15, 1787:

"The interfering and unneighbourly regulations of some states, contrary to the true spirit of the union, have, in different instances, given just cause of umbrage and complaint to others; and it is to be feared that examples of this nature, if not re-

strained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord, than injurious impediments to the intercourse between the different parts of the confederacy. 'The commerce of the German empire,** is in continual trammels, from the multiplicity of the duties which the several princes and states exact upon the merchandize passing through their territories by means of which the fine streams and navigable rivers with which Germany is so happily watered, are rendered almost useless.' Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of state regulations, that the citizens of each, would at length come to be considered and treated by the others in no better light than that of foreigners and aliens."

**Encyclopedia, article Empire.

What Hamilton feared might arise from customs, duties and imposts on goods is now in full force through State competition in taxing property and revenue belonging to foreign corporations owned or received by such corporations outside the State boundaries.

Argument.

As a general summary of the position of the plaintiff, developed under various heads more fully in this brief, we submit the following:

1. Assuming the Connecticut tax to be what the statute itself says that it is, namely, a tax on net income:

Taxation upon net income is either (a) a direct tax upon the property out of which the income issues, which is another way of saying that it is upon the tangible and intangible assets of the corporation, or (b) it is a tax upon net income, as such, as a species of property disconnected from all other assets of the corporation.

If this tax falls under (a), it is clearly invalid, since, under the Connecticut allocation, that State takes 47 per cent. of all the property and, accordingly, is taxing assets outside of Connecticut, no allowance for intangibles being made.

If this tax falls under (b), then the situs of the net income, which is the property that is taxed, is all important, and whether such situs is exclusively in Delaware as the domicile of the corporation, or is localized in part in various States, it certainly is not lawfully allocated by a division among the States upon a comparison of tangible assets only.

2. If the Connecticut tax is a property tax upon the assets of the corporation in Connecticut, it is invalid because it is not dependent in fact on the value of such assets, no appraisal being provided, no recourse to the courts for ascertainment or correction of the valuation except as to the *relative* value of tangible assets in Connecticut to tangible assets everywhere, and there being no provision for ascertainment of their value unless by an arbitrary form of application of the so-called unit rule. This fundamental error is emphasized by the fact that there is no allowance or deduction for stocks, bonds, accounts receivable, bank deposits or other intangible assets of that character located outside of Connecticut.

If the tax could possibly be considered as a tax on property of the corporation in Connecticut measured by part of the net income, it is invalid because it is based upon the false assumption that net income is produced, and has a local situs, in proportion to the relative location of tangible assets only.

3. If the tax is regarded as an excise for the privilege of doing business in Connecticut, to be valid it should have been confined to the subject-matter which Connecticut is entitled to control; that is, the manufacturing and the business purely intrastate, consisting of sales and shipments from Hartford to Connecticut customers, also leases, repairs, etc., in Connecticut for Connecticut customers, and probably if it is such an excise, it must have a suitable maximum. At all events, it must have some logical or reasonable relation to the exercise or value of these privileges.

If not described and intended as such an excise, it should, at the very least, operate in effect as such. But the measure adopted having no relation whatever to intrastate sales, leases and repairs, etc., and only the most arbitrary relation to manufacturing carried on in Connecticut, and having no maximum, cannot be regarded as satisfying the law. Forty-seven per cent. of the net income is arrogated to itself by Connecticut purely on the basis of tangible assets in Connecticut on a given day of the year, without any consideration of the volume of manufacturing at the factory or the ratio of income which might be said to issue out of the manufacturing operations, and the allocation is without allowance or opportunity for adjustment on account of varying ratios of net income produced by the various operations of the corporation, and

without deduction on account of income issuing entirely and wholly out of business having no connection with Connecticut.

We submit that it was not intended by the Legislature as an excise and whether it was or not, its operation and effect render it invalid because it is unreasonable, arbitrary and has not even a remote relation to the business privileges which Connecticut can control. Furthermore, even regarding net income as a measure only, it is not open to Connecticut to assess foreign corporations upon data so irrelevant, so inadequate and so remotely related, both commercially and logically, to the exercise of local business privileges.

4. Upon every one of the above alternative theories of this tax, it transgresses either the commerce clause, the due process clause, or it discriminates unlawfully against the foreign corporation, principally engaged in interstate commerce and established in the State prior to this legislation.

I.

The tax is upon income as such, and hence is a property tax. It is null and void because it lays a tax upon the receipts from interstate commerce and upon property located without the State of Connecticut.

It is fundamental that, to determine the nature of the tax, recourse must first be had to its language. The following excerpts from the law are pertinent:

Sec. 20: "Each such company * * * shall pay a tax annually to the State upon the net income for its fiscal or calendar year next preceding as hereinafter provided, upon which income such company is required to pay a tax to the United States."

Sec. 21: "If the amount of the annual net income as returned by each such company to the collector of internal revenue is changed or corrected by the commissioner of internal revenue or by other official of the United States, such company, within ten days after receipt of notification of such change or correction, shall make return under oath or affirmation to the tax commissioner of such changed or corrected net income upon which the tax is required to be paid to the United States. If any deduction is made from the net income as returned, the comptroller shall draw his order in favor of such company on the treasurer, on the voucher of the tax commissioner for the amount of any tax paid upon such deduction, or if any addition is made, such company shall, within thirty days after receipt of notice from the tax commissioner of the amount of such addition, pay the tax thereon."

Sec. 22: "If such company carries on business outside of this state, a portion of the net income on which the tax is imposed by the United States shall be apportioned to this state as follows: * * *."

Sec. 23: "The tax commissioner, on or before the first day of July in each year, shall make a list of companies subject to the tax upon their net incomes, with the amount of such net incomes taxable in this state, * * * and a tax is hereby laid on each such company of two per centum of such net income, * * *."

Clearly and unmistakably the language of the law fastens its grip upon the income as such. The requirement of Section 20 is to pay a tax "upon the net income," and by Section 22 it is "a portion of the net income" that is apportioned. Any doubt that the law sought the income as such and not a franchise or privilege measured by income, is dispelled by the language of Section 23, wherein the Commissioner is required to make a "list of companies subject to the tax *upon their net incomes*, with the amount of such *net income taxable* in this state." Obviously this language is incompatible with the theory that a franchise or privilege was being taxed. Moreover, the Act refers to and makes a part and parcel of itself the Federal Income Tax Law, which is a straight income tax act, not a franchise or privilege tax.

In this connection, it is significant that the Connecticut tax is made to rise or fall in accordance with the rulings of the Commissioner of Internal Revenue (Sec. 21), a clear-cut indication that income as such is the goal of the tax. It is common knowledge that innumerable rules and regulations are prescribed by the Federal Government in the determination of taxable income, which bear no relation to the value of a franchise or privilege. Of this character are the limited exemptions and allowances upon earnings from Liberty bonds.

Furthermore, Section 20 of the Connecticut Act requires a corporation to furnish under oath to the Tax Commissioner "a true copy of the last return made to the Collector of Internal Revenue."

Upon reference to the Federal Income Tax Law of 1913, to which the Connecticut Act refers, it will be found that no one has the right of inspection

of a Federal income tax return except under the order of the President and except also a State imposing a general income tax (Subd. G(d) of the Federal Income Tax Law, October 3, 1913).

The precise language of the Federal law is as follows:

"Provided further, that the proper officers of any state imposing a general income tax may, upon the request of the governor thereof, have access to said returns or to an abstract thereof, showing the name and income of each such corporation, joint stock company, association or insurance company, at such times and in such manner as the Secretary of the Treasury may prescribe."

This is a clear-cut indication of an intention to create an income tax law and not an excise law, for the State has no right of inspection of Federal income tax returns for the purpose of computing an *excise* tax and, hence, no authority on that basis to compel the production of a sworn copy thereof.

Under the Federal statute the State could only acquire an inspection of the Federal return through compliance with the specific provisions of the Federal Act, and it would be a deliberate violation of the provisions of that Act to obtain the same information by compelling a taxpayer to produce a copy of it under oath. Compelling the production of a copy of the Federal return in connection with the imposition of an *excise* tax would be a violation of Article VI, Section 2, of the Federal Constitution, which provides as follows:

"This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or

which shall be made under the authority of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Upon the assumption that the Connecticut Act was passed with lawful intent, it necessarily follows that the Legislature must have intended an income tax as distinguished from an excise.

Further indication that the intent and purpose of the law is to tax income as such will be found in the preceding provisions of the same chapter (Chap. 292, Laws of 1915), covering taxes on other kinds of corporations. It will be remembered that the law is in five parts. Part I is a tax upon gross earnings of railroad corporations. It is in terms a tax upon property and is open to no other interpretation than it is a property tax (*Fargo v. Hart*, 193 U. S., 490). Part II is a tax upon the gross earnings of water, gas, electric and power companies, and is likewise a property tax. Section 16 of this part reads as follows: "The tax upon gross earnings as provided in part two shall be in lieu of all license, corporate excess, or income taxes payable to the state * * *." This reference to income taxes is significant, for it is a recognition that such a tax exists in Connecticut as distinguished from an excise tax, and, upon examining the Connecticut tax laws, it will be found that Part IV of this chapter is the only law in the State which can possibly be construed as an income tax law.

When we consider this in connection with the fact that Part IV, covering the taxation of Mis-

cellaneous Corporations, contains no similar or other exemption for excise or privilege taxes, it is apparent that the Legislature considered the tax on Miscellaneous Corporations as an income tax, that is, a tax upon income as such. In so far as these corporations are concerned, it left itself free to impose excise or privilege taxes in addition to the income tax. That such is the case is further indicated by the fact that Part III of the Act, covering taxes on insurance companies, expressly states that it is a tax on the corporate franchise.

Thus, when the Legislature meant to tax the franchise, it said so in plain language, and when it meant to tax income as such, it said so in terms equally plain and unequivocal.

There is not a word in the Act to indicate that the value of the franchise is sought through the process of using income as a measuring rod. Resort has not even been had to the use of such expressions as "a tax equal to two per cent.," or "a tax equivalent to two per cent.," the usual ear marks of an attempt to tax a franchise as distinguished from a tax upon the property used for the purpose of computing the tax. Nor is there any maximum limitation upon the tax, the existence of which, under *Baltic Mining Co. v. Massachusetts*, 231 U. S., 68, would indicate a privilege or franchise tax and the absence of which, under *International Paper Co. v. Massachusetts*, 246 U. S., 135, stamps the Act as an attempt to reach property located out of the State. In short, this Act is in language and necessary operation a bold, undisguised effort to tax income as such wherever arising or accruing.

No one reading the Act itself and contemplating its operations upon the plaintiff corporation, as

disclosed in the statement of facts, can reach any other conclusion than that it is the income which is sought, not the value of the privilege of doing business within the State.

The State Court, interpreting the statute as one imposing an excise tax in order to attempt to justify its validity, has expressly held that the tax is not on property. Its argument in support of its determination is decidedly illogical. Thus the prevailing opinion reads:

"It is necessary in the first place to determine the nature of the tax complained of. The state contends that it is in the nature of an excise tax, the plaintiff that it is a tax on property, and the brief filed by the *amicus curiae* that it is an income tax. We think the state is right in its characterization of the tax. It is not a tax on property. The plaintiff pays a separate local tax on its property. This tax falls on income and not on property. If the plaintiff had made no net income for the year 1915 it would have escaped this tax altogether, although its taxable property in Connecticut on July 1st, 1915, remained the same as before."

The fallacy of this argument is presented in the single sentence: "This tax falls on income and not on property."

Income is property, and a tax upon it is a property tax.

Pollock v. Farmers' Loan & Trust Co.,
157 U. S., 429.

Maguire v. Tax Commissioner, 230 Mass.,
503 (aff'd 40 Sup. Ct. Rep., 417).

Opinion of the Justices, 220 Mass., 613,
624.

In *Maguire v. Tax Commissioner*, 230 Mass., 503, the Court, in discussing the Massachusetts limited income tax laid against a resident, said in speaking of the rights of a Massachusetts beneficiary in a trust fund held by a Pennsylvania trustee:

"The *cestui que trust* has important legal rights respecting the trust funds which are personal to her. They are rights in the nature of property. They cannot be taken away from her by arbitrary or irrational procedure. They attach to her person wherever she goes. One of these is the right to receive the income. That is a property right. The income when received is property. The tax herein questioned is a property tax."

The decision of the Massachusetts Court in *Maguire v. Tax Commissioner* was affirmed by the United States Supreme Court in April, 1920. It will be observed that this affirmance occurred some time after the decision of the Connecticut Court in the case at bar, and hence it did not then have the benefit of the views of this Court. The Massachusetts Court's theory that income is property is confirmed by the opinion of this Court in the following language:

"It is true that the legal title of the property is held by the trustee in Pennsylvania, but it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title and interest distinct from its legal ownership. 'The legal owner holds direct and absolute dominion over the property in the view of the law, but the income, profits, or benefits thereof in his hands belong wholly or in part to others.' 2 Story Equity, 11th Edition, Section 964. It is this property right belonging to the beneficiary,

realized in the shape of income, which is the subject matter of the tax under the statute of Massachusetts. The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property."

Maguire v. Trefry, 40 Sup. Ct. Rep., 417, 419.

We are unable to follow the reasoning of the Connecticut Court that the tax must be an excise tax because if there were no income there would be no tax. It seems to us that the exemption from taxation in that instance proceeds from the absence of subject-matter upon which to levy the tax, to wit, the absence of income. The supposititious case suggested by the Court below rather tends to indicate that the income and not the franchise or privilege was the subject of the tax. Though the corporation may never make any income and therefore may never pay any tax, it will at all times exercise the privilege of doing business. If it was intended to tax this privilege, would not the law have provided for a minimum tax in the absence of income? The New York statute, which is characterized as a franchise tax in the Act itself, contains just such a provision.

In stating that although a corporation makes no net income its taxable property in Connecticut remains the same, the learned Justice who wrote for the State Court has failed to recognize that property and income derived from the use of property, in conjunction with other agencies such as labor and services, are both property. If A, with his automobile, draws a load for B at the agreed price of \$15, and A's total expenses are \$10, upon the receipt of the \$15 in the form of three \$5 bills,

A's net income is \$5, represented by one of the \$5 bills; that \$5 bill in his possession is personal property—as such, subject to execution, and distributable among his next of kin in case of death, as distinguished from heirs at law. One may call it income, gain or profit, but in the last analysis it is \$5, the very best quality of personal property. Who can say with propriety that the automobile is property and that the \$5 is not, because it is income?

At all events, it is a foregone conclusion that a sheriff, with process in hand, would not be impressed with the contention that the \$5 was not leviable personal property because it was income. We do not believe that any court in the land would be inclined to disagree with the sheriff. But just as surely as it is personalty for the purpose of sale on execution, it is personalty for the purpose of taxation. A tax upon it is a tax upon property. From no matter what standpoint the subject-matter is viewed, the conclusion is inescapable that the provisions of this law constitute a tax upon income as such and therefore a tax upon property.

So considered, what is the effect of its provisions?

It is, of course, undisputed that the law does not in terms confine its operation to income actually earned within the State of Connecticut. The tax is laid upon income arising and accruing from all sources everywhere. By reference to the record it will be found that it attaches to earnings received in possession outside of Connecticut from operations wholly carried on without the State. As previously pointed out in the instant case, it attaches to gross earnings aggregating over a million and a half dollars, which, by no conceivable theory,

could be deemed to have been earned within Connecticut (see p. 16, *supra*).

Obviously, as to these items there can be no question that the tax is upon property located without the State. The prevailing opinion below tacitly admits it, but dismisses the conclusion naturally deducible therefrom, that a tax thereon is void, upon the theory that these items amount only to 10 per cent. of plaintiff's gross earnings, and are therefore inconsequential. As pointed out by Judge Wheeler in his dissenting opinion (p. 62 of Record), this circumstance could not make the tax constitutional.

Moreover, it does not follow that because these items constitute only 10 per cent. of the gross in 1915, that the ratio will forever prevail. As a matter of fact, during the war period, when the Government consumed 95 per cent. of its new products, its net earnings from rentals and repairs outside of Connecticut increased many fold. The purchasing public, unable to acquire new typewriters, were compelled to resort to repeated repairs to machines on hand and to renting second-hand typewriters. The returns from these sources were consequently most profitable, while, on the other hand, returns from the sales of new machines manufactured in Hartford were not so profitable, for Congress, by special provision, fixed the price to be paid by the Government for typewriters, and, in doing so, prescribed a much lower figure than that realizable in the open market.

Furthermore, with respect to sales of new machines manufactured in Connecticut, but sold outside of Connecticut, it is equally apparent that the income earned from such sales received in posses-

sion outside of Connecticut and which never reaches the borders of that State, is also property located without the State. It is suggested that some portion of this income must be deemed to have been earned within the State of Connecticut because it is in part at least earned as a result of manufacturing the article in Connecticut. What is really meant by this is, that the manufactured product, when completed in Connecticut, has a value there as a finished article in excess of its manufacturing cost, and that when it is sold, no matter where sold, the difference between the manufacturing cost and its value as a finished product must be deemed to have been earned in Connecticut, and this difference, it is claimed, will be found in the net income. The error of this theory lies in the failure to distinguish between the value of the tangible property sold and the income realized from the sale. Concededly, a finished typewriter lying in the factory in Hartford has a value as such in excess of its manufacturing cost, and it may be taxed upon that value by Connecticut. Presumably it is so taxed under the General Property Tax Law. When this finished product, however, is moved from Connecticut and money expended in its removal, and money and effort expended in selling it, the resultant profit is one realized where the sale takes place. That portion of the money realized on such a sale, representing the difference between manufacturing cost and the value of the machine in Connecticut before its removal, merely takes the place of the product which has been sold (*Amer. Mfg. Co. v. St. Louis*, 250 U. S., 459). Its exact situs is in the gross sales of the product manufactured in Connecticut; it may or may not survive to the stage of net income, depending upon whether the process of sale accom-

plished a gain or loss. It is conceivable that a selling loss might wipe out the value of the finished product, leaving in net income only earnings from sources wholly independent from the sale of the product manufactured in Connecticut.

At all events, any percentage of the total net income cannot reflect the value of the finished product in Connecticut, for on one hand such net income includes earnings from sources other than the sale of the finished product and, on the other hand, it takes into account deductions such as selling expenses, transportation charges, rents, etc., which are not properly chargeable against the cost of manufacturing the product in Connecticut. The distinction noted above is apparent, if we contemplate the illustration of a concern manufacturing an article in Connecticut and selling it to wholesalers or retailers in Connecticut at a figure above manufacturing cost. It would hardly be contended that a profit made by the wholesaler or retailer in reselling the article outside of Connecticut was in any way attributable to the manufacture of the article in Connecticut by the manufacturer. If this be true, is it not equally true if the sale is made outside of the State by the manufacturer himself? The impropriety of attributing any part of the wholesaler's or retailer's profits to the manufacturer in Connecticut, while emphasized by the circumstance that the manufacturer and the wholesaler or retailer are different persons or entities, does not rest upon that circumstance, but rather upon the fact that the process of manufacturing and the process of selling are separate and distinct. (*Adams Express Co. v. Ohio*, 165 U. S., 194.) The following quotation from page

222 of the prevailing opinion in the case cited is of interest :

“The same party may own a manufacturing establishment in one State and a store in another, and may make profit by operating the two, but the work of each is separate. The value of the factory in itself is not conditioned on that of the store or vice versa, nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership.”

In its final analysis, manufacturing produces only an article which in its finished state has a value in excess of its manufacturing cost, and income or profit realized from its disposition lies in the difference between its cost and such enhanced value. The minute one applies the commercial agencies of selling to the finished product, the resultant profit is attributable only to the processes of sale. Undoubtedly the State of Connecticut could tax the difference between the manufacturing cost and the enhanced value of the completed article in the form of a property tax, or as a tax upon the privilege of manufacturing, as in *American Mfg. Co. v. St. Louis, supra*; but it does not purport to do so under the Act which is here for review. On the contrary, it taxes income as such without any consideration of the value of the finished product.

But it will be contended that in adopting the method of apportionment by comparing tangibles within the State with those located elsewhere, Connecticut is attempting only to arrive at the difference between manufacturing cost and the

value as a finished product in Connecticut, and that that attempt approximates the true result. Obviously the rule of apportionment adopted could not possibly lead to any such result. Tangibles located without the State of Connecticut cannot possibly have any bearing upon the cost of manufacturing in Connecticut, nor do they in any way have any relation to the value of the finished products in Connecticut. (*Adams Express Co. v. Ohio, supra*, p. 222.) And, as previously pointed out, no percentage of total net income can properly fix the value of the finished product, as in the fixation of net income items of earnings are included in the one side which were not derived from the sale of the manufactured product, and expenses are deducted on the other which were not incurred in the manufacturing of the product.

As a matter of fact, the law does not, in word or reasonable intent, seek to tax the finished product in Connecticut, nor, for that matter, any other tangibles located therein. It seeks income as such, as distinguished from and without any regard for or consideration of the property, be it tangible or intangible, from which the income is produced. In operation it reaches out into a neighboring State and lays hold of interest earned within that State on bank deposits and dividends secured in such other State from stock of other corporations, and interest on bonds, be they Federal or otherwise, located outside of Connecticut. In this manner it not only taxes income earned without the State, but exacts an impost upon the personal property through which the income is earned.

*People ex rel. Alpha Portland Cement Co.
v. Knapp*, 191 App. Div. (N. Y.), 262.

The case cited, which is squarely in point, involves the constitutionality of the New York Corporation Franchise Tax Act, which measures the tax upon a portion of the net income. The Act purports upon its face to be a franchise tax, but in operation it was held by the New York Court to be in part a tax upon property located without the State and therefore unconstitutional and void. This conclusion was reached by a consideration of the provisions relating to the allocation of income to the State. The method adopted by the law consisted of a comparison of certain assets within the State with similar assets everywhere. The law excluded for such comparison purposes the value of stock of other companies in excess of a limit of 10 per cent. of the real and tangible personal property located in New York. The plaintiff, which was a foreign corporation, owned a large amount of stock of another corporation, operating in Pennsylvania, and from such stock ownership it realized a large return. The income from these assets were included in the taxable income, but the greater portion of the value of the stock was excluded from the total of assets located out of the State in the establishment of the fraction for allocation purposes. In holding that this circumstance rendered the Act unconstitutional, the New York Court said:

"The relator does not have these stocks within the State of New York; the physical assets are not within this State. They do not appear to have any relation whatever to the business transacted in this State, any more than would be the case if the New Jersey corporation was the direct owner of the plant in Pennsylvania, where it is, in fact, engaged in manufacturing cement.

Reading the Tax Law as a whole, and considering its purpose to place domestic and foreign corporations upon a basis of equality, and recognizing that for purposes of taxation the capital of a corporation invested in the stock of another corporation shall be deemed assets located where the physical property represented by such stock is located (Tax Law, secs. 181, 182), it seems clear to us that it was never intended that the statute should be given such a construction as to impose a tax upon property wholly without the territorial jurisdiction of the State, and we are of the opinion that a contrary construction would operate to invalidate the statute. It is true, of course, that values within the State may be influenced by the value of the entire property as a going concern, and to this extent the Legislature may extend its legislative influence beyond the confines of the State without doing violence to constitutional principles, but to hold that the State of New York may go over into the Commonwealth of Pennsylvania and impose a burden upon a corporation of the State of New Jersey, lawfully carrying on business there, is to go beyond the powers of any State. In the recent case of *Looney v. Crane Co.* (245 U. S., 178, 188) the court held squarely that the States, by reason of their power to exclude foreign corporations, could not, as a condition of permitting them to do business within a State, exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the State in disregard, not only of the commerce clause of the United States Constitution (Art. I, sec. 8, subd. 3), but of the due process clause of section 1 of the Fourteenth Amendment, citing many authorities, and we are clearly of the opinion that the statute, as construed by the Tax Com-

mission, is open to this objection. We are equally persuaded that the concession of a small percentage does not operate to avoid this objection. The effect of the statute, as here construed, is to include in the assessment a very large property located wholly within the Commonwealth of Pennsylvania and owned by a corporation created by the State of New Jersey and having its principal place of business in the Commonwealth of Pennsylvania. All of this property, and all of the right of levying a franchise or license tax upon the relator in respect to this property, are within the Commonwealth of Pennsylvania, and it would be destructive of that harmony among the States which it was the purpose of the United States Constitution to foster, if the result sought to be accomplished in this assessment could be attained.

The reasoning and the conclusion of the court in *Oklahoma v. Wells, Fargo & Co.* (223 U. S. 298, 300, 301), in connection with the case last above cited, seem conclusive upon the question presented here, and we are of the opinion that there can be no lawful authority for taxing the bonds and the stocks owned and held by the relator within the Commonwealth of Pennsylvania. They have no relation to the business carried on within the State of New York by the relator, and we see no escape from the conclusion that the tax is wholly void. The case of *United States Glue Co. v. Oak Creek* (247 U. S. 321) involved the sole question whether an income tax of the State of Wisconsin on income derived by the plaintiff from interstate commerce was unconstitutional and void, and the court held that as the tax was upon incomes generally, and not upon the particular source from which it was derived, it was not void. It involved no question such as is here under consideration, and has no bearing as an authority."

The only case other than the New York decision above referred to in which the question of allocating net income is considered is *Baldwin Tool Works v. Blue*, 240 Fed. Rep., 202. This case is characterized by Mr. Justice Beach, in his prevailing opinion, as directly in point, and it is cited by him as an authority in favor of the constitutionality of the Connecticut tax. If it is in point, it is only so to the extent of pointing out a feature of the Connecticut Act which renders it unconstitutional. In the *Baldwin* case the tax was an excise, not an income tax, and, additionally, the apportionment was predicated upon a comparison of the value of *all* the assets and property within the State with the total value of *all* the assets and property everywhere (see opinion of Mr. Justice Beach, p. 50 of the Record, fol. 80). Concededly, this method is entirely different from that adopted by Connecticut. It is conceivable that a comparison of all the property and assets within and without the State might fairly approximate the income earned within a State, but it is absolutely certain that a comparison of only certain selected assets will not. It follows that the reasons which impelled the Federal Court in *Baldwin Tool Works v. Blue* to hold that tax valid would warrant a determination that the Connecticut Act is invalid. It is apparent that the Connecticut Act comes within the ruling in the *Alpha Portland Cement* case, *supra*; certainly not within the scope of the decision in the *Baldwin* case.

It has been suggested and perhaps will be argued that the Connecticut Act is really and actually a tax upon its tangible property in Connecticut and

that the income features in the Act are included solely for the purpose of ascertaining the value of the tangibles, it being considered that such value is influenced by the value of the entire property as a going concern, as reflected by net income.

II.

Considered as a tax on plaintiff's tangible property in Connecticut, the Act wholly fails to answer the requirements of law applicable to such a tax.

No argument is necessary to show that Connecticut has no power to tax property outside of Connecticut. Doubtless Connecticut, however, could tax the property of the plaintiff situated in the State, even though used in interstate commerce. If she did, the tax must be dependent in fact on the value of the property. The Connecticut Court says that this tax *is* so dependent, but contents itself with the bare assertion.

We submit that it is not: that there is no machinery for valuation; and that unless the "unit rule" can apply, and can be utilized by taking a unit of net income as equivalent to a unit of physical property, there is not even an attempt to make the tax thus dependent.

We submit that the "unit rule" cannot be thus strained.

By the allocation based solely on physical assets, Connecticut is drawing into her jurisdiction, in effect, intangible assets and property and business of great value which are located elsewhere, but not even then is she attempting a *valuation*.

The so-called "unit rule" of valuation was first applied to railroads and telegraph lines on a basis of mileage within a given State, and was laid down in very broad terms, which have since been considerably modified.

It was then extended in *Adams Express Co. v. Ohio*, 165 U. S., 194, to express companies after lengthy argument and by a decision of five Judges to four. It has never, so far as we are aware, been applied to a manufacturing or trading corporation such as the plaintiff. In reason it ought not to be, since there is a mere unity of ownership and no unity of character or use.

It is of sufficient importance in this case to justify quotation below from the Ohio cases and from subsequent decisions of this Court, to show that any such basis of apportionment applied to manufacturing or trading corporations is untenable and invalid.

The majority opinion of this Court in *Adams Express Co. v. Ohio State Auditor*, 165 U. S., 194, in its discussion of the then novel theory of "unity of use," said this (p. 221):

"The physical unity existing in the former (*i. e.*, a railroad) is lacking in the latter (*i. e.*, an express business); but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use."

Page 222:

"We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for

the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business.”

With regard to the case at bar, we call attention to the exposition of the Court, on the same page, as follows:

“The same party may own a manufacturing establishment in one state and a store in another, and may make profit by operating the two, but the work of each is separate. The value of the factory in itself is not conditioned on that of the store or vice versa, nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership. But the property of an express company distributed through different states is, as an essential condition of the business, united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business.”

The illustration stated by the Court in the last paragraph is exactly the case at bar.

It should be remembered that the whole reason and purpose of the unit rule is that of a *valuation* of physical property by increasing its actual or intrinsic value through some addition derived from the general good will and similar intangible values supposed to arise from the business existing as a going concern. In the operation of a railroad, and to a less extent of an express company, the business which it does is of substantially the same character in every State and over all parts of its line. Its plant is also of the same generally uniform char-

acter in the various States. All its employees in different States meet its customers for the reception and delivery of traffic in the same way and for the same purpose everywhere; its good will depends largely upon the daily contact of its representatives with the public in the same way at all points on its lines. In short, all its plant is a unit and each set of local properties contributes the same sort and kind of service and of business that the other sets of property do.

The plaintiff's business is totally different. Its factory, raw material and goods in process in Connecticut are, of course, one element in all its business. But its factory force do not meet the customers at all; and it is of no consequence where the factory is located. Granting that the quality of the goods contributes to the good will, it is a contribution of a wholly different sort and kind than the contribution made by the other operations of the corporation. Certainly it is absurd to say that its contribution is in direct proportion to the relative values of tangible property in Connecticut and elsewhere. Outside of Connecticut the sales or lease of the finished product, the conduct and operation of its numerous branch stores, its purchasing department, collection of accounts, etc., bring its representatives into wholly different relations to the customers. These selling and financial operations contribute services in building up its good will and its net income which are disconnected with manufacture and radically different in character. In short, there is, in its dealings with its tangible property in Connecticut and its tangible property elsewhere, only a unity of ownership, not a unity of use in any sense.

The distinction above quoted from the opinion of Mr. Chief Justice Fuller in *Adams Express Co. v. Ohio State Auditor* is enforced and emphasized by the dissenting opinion in that case, written by Mr. Justice White, where he says (p. 250) that the unit rule, applied to telegraph and railroad companies, "pushes the power of State taxation, as to these particular kinds of property, at least to the confines of the Constitution." Further, on page 253, he sets out with great force the injustice and confusion which would arise by applying the unit rule to merchants or trading corporations having tangible property and carrying on business in different States.

The next step, *Fargo v. Hart*, 193 U. S., 490, was to exclude from such valuation under the unit rule, assets of the character of stocks and bonds. *Fargo v. Hart* was a valuation of Indiana property of a foreign express company upon a mileage basis, and a valuation of total assets "made up principally from real and personal property not necessarily used in the actual business of the company and permanently located in the State where the company is incorporated," was set aside. The argument of the State was that all the property of the express company ought to enter into the valuation "because wherever situated it was used in the business; if not otherwise, at least as giving the credit necessary for carrying the business on."

This Court said (p. 499):

"The general principles to be applied are settled. A State cannot tax the privilege of carrying on commerce among the States. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. * * * When that property (prop-

erty permanently within its jurisdiction) is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the State in taxing, even though the other parts of the system are outside of the State. * * *

The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the State to the whole system.

It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable. * * *

In the *Express Companies'* cases previously decided, it was pointed out that there was nothing to show that the line might not fairly be assumed to be of substantially the same value throughout."

Page 501 :

"It will be seen that we are dealing with much more attenuated relations than when there is a physical line of rails or wires to be valued, every mile of which is a necessary condition of the use of the rest of the lines beyond, and therefore a reflex condition of the value of the line behind it. * * * The (Indiana) express business added nothing to the value of the bonds in New York. Conversely, the utmost extent to which those bonds entered into the value of property in Indiana was in so far as they helped to make the public believe that the express company

could be trusted and therefore increased its good will. * * * But it is obvious that merely from the point of view that the express company could be trusted by the public with the carriage of goods or money the good will could not be measured by the assets. * * * Certainly it is absurd to say that the business of such companies will bear an exact, or any, proportion to the stocks and bonds which they may own. * * * Assume that something is to be added to the good will of a company because it is safe, and that the good will, or a part of it, of the express business in Indiana may be considered in assessing its property there, this is very different from measuring the good will by the capital, when the facts appear as they do in this case. The difference is not a mere difference in valuation, it is a difference in principle, and in our opinion the principle adopted by the board was wrong. It involved an attempt to tax property beyond the jurisdiction of the State, and to throw an unconstitutional burden on commerce among the States."

The Connecticut statute permits no deduction or adjustment for the stocks from which the plaintiff derived dividends nor for bank deposits, accounts receivable or any other intangible assets, but (on the theory under discussion) bases its scheme absolutely upon the theory that every sort of asset not only enters into the *valuation* of Connecticut assets, but enters in direct proportion to Connecticut tangible property.

Thus, by taking into the valuation the entire net income, from whatever source derived, but without making allowance, in the allocation, for intangible assets producing income, Connecticut, "in order to

increase proportionately the value" of property in the State, is including "valuable property outside of it." *Oklahoma v. Wells Fargo & Co.*, 223 U. S., 298.

In that case there was a tax labelled "gross revenue tax" and it was said to be in addition to taxes levied on an *ad valorem* basis. The tax was to be "equal to such proportion of the gross receipts as the portion of its business done within the State bears to the whole of its business."

It appeared (p. 300) that the receipts were largely from interstate commerce and also that large sums came from investments in bonds and land outside the State.

Held, "It is evident that if the tax is what it calls itself, it is bad on the former ground, and that whatever it is, it is bad on the latter."

The Court discussed *Fargo v. Hart*, and said:

"The same principle would apply to a property tax measuring the total property by the total gross receipts increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the State to that outside."

The Court then proceeds to say that this is not a property tax since the property in Oklahoma was otherwise subject to an *ad valorem* tax, but that even if it could be supposed that it was intended to reach only the additional value of such property given by its being part of a going concern, "it is plain that the gross receipts from all sources could not have been used as a means for estimating the going value of the property in the State."

It is clear from that decision that the invalidity rested in part at least upon including in such a

basis revenue from outside the State. Under the Connecticut statute the error is not from taking gross revenue as a basis, but net revenue from all sources. Whatever novel immunity under recent decisions may attach to net income, it cannot be that this is among them, for the fact must be recognized that the net income of a corporation comes from somewhere, and when all the net income is the basis, all the property and assets of the corporation are necessarily likewise the basis.

It cannot be too often repeated that the question in this case is precisely the same as if Connecticut had laid its tax upon the entire net income of the plaintiff; for if Connecticut is attempting to tax one iota of net income, or other property, outside of Connecticut, the tax is just as invalid, and for the same reason, as if Connecticut attempted to tax the entire net income.

In its majority opinion, the Connecticut court upheld the tax on the ground (Record, p. 51) that

"We are asked to take judicial notice of the fact that 47% of the net income of the plaintiff corporation cannot reasonably be attributed to its operations in Connecticut."

The Court does not fairly or properly state the issue. The question really is, *whether Connecticut may be permitted to tax any proportion or part of income produced by property and sources wholly without the State.*

The unit rule itself has recently had additional stringent limitations, even as to property of carriers, marked by unity of character and use. One was in the recent case of *Union Tank Line Co. v. Wright*, 249 U. S., 275, where *Pullman Palace Car*

Co. v. Pennsylvania, 141 U. S., 18, was distinguished and practically overruled.

A New Jersey company owning many tank cars, rented by shippers, was assessed for those running in and out of Georgia, upon a track-mileage basis, *i. e.*, in an amount bearing the same ratio to the value of all its cars and other personal property as the ratio of the miles of railroad over which it operated cars in Georgia bore to the total mileage over which all were run, there and elsewhere.

The facts showed that the average number of cars in Georgia was fifty-seven, each worth \$830, total, \$47,310, upon which, as property, the usual local tax had been paid. Under the Georgia assessment for additional tax, these cars were assessed at over \$290,000. Georgia reached this amount by using the above ratio (miles in Georgia about 7,000 compared with total miles of about 250,000), making a percentage of 2.75, and valued the cars by applying that percentage to the total value of \$10,000,000, which represented all the cars and other personal property of the plaintiff in Georgia and elsewhere.

The State court held that the physical property had been lawfully appraised. This Court reversed the decision and said (p. 282) :

“A State may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the Fourteenth Amendment. * * * While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well ‘the intangible value due to what we have called the organic relation of the property in the State to the whole system.’ How to appraise them fairly when the tangibles consti-

tute a part of a going concern operating in many States often presents grave difficulties; * * * if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both." (Citing many cases.)

Page 283:

"Real values—the essential aim—of property within a State cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one State while hundreds constantly employed in another moved over lines of less total length. * * *

"We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed law would deprive it of property without due process of law and also unduly burden interstate commerce.

"*Pullman's Palace Car Co. v. Pennsylvania*, *supra*, relied on by defendant in error, contains the following passage which seems to uphold the Georgia rule—"The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the

States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.' But the point therein spoken of was unnecessary to determination of the cause; and so far as the quoted passage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable and productive of conclusive results, it must be regarded as *obiter dictum*, and we cannot now approve or follow it."

The Court then analyzed the *Pullman* case and pointed out that the appraisal in that case was clearly below the actual value of the cars operating in Pennsylvania, and that the company did not question the *amount* of the assessment, but claimed complete *exemption* on interstate commerce grounds. The Court then said (p. 286) :

"Taxes must follow realities, not mere deductions from inadequate or irrelevant data."

Justices Pitney, Brandeis and Clarke dissented, and said in the course of their opinion (p. 295) :

"If, for any reason that does not appear, the rule operated unfairly in this particular case, and imposed an unjust and inequitable burden of taxation upon plaintiff in error, it was incumbent upon plaintiff in error to show this by calling for an arbitration upon the question of true value, as permitted by the Georgia statutes * * * or by some appropriate proceeding for relief against the excessive part of the taxes."

Wallace v. Hines (May 3, 1920), 40 Supreme Court Reporter, 435.

This case involved a statute of North Dakota purporting to be a special excise tax upon doing business in the State. An interstate railroad was granted a preliminary injunction, the complaint alleging that the apportionment was made by comparing mileage in North Dakota with mileage of the whole line. The Court held that mode of assessment indefensible and said (p. 502):

"North Dakota is a state of plains, very different from the other states, and the cost of the roads there was much less than it was in the mountainous regions that the roads had to traverse. The state is mainly agricultural. Its markets are outside its boundaries, and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other states. So, looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.

*"The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it. (Italics are ours.) * * ** Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. Hence the possession of bonds secured by mortgage of lands in other states, or of a land grant in another state, or of other property that adds to the riches of the corporation, but does not affect the North Dakota part of the road, is no sufficient ground for the increase of the tax,—what-

ever it may be,—whether a tax on property, or, as here, an excise upon doing business in the state. (*St. Louis, etc., Co. v. Arkansas*, 235 U. S. 350.)”

If the unit rule, so long established, has been thus shaken concerning rolling stock and railroad plant on account of producing an arbitrary result from “inadequate and irrelevant data,” how much less can that rule be applied under the rigid and inflexible allocation of net income under the Connecticut statute by comparing physical properties of a trading corporation varying in character, in use, and undoubtedly in the ratio of the income which they helped to produce.

Furthermore, under the dissenting opinion in the *Union Tank* case it was pointed out that the plaintiff could have relief under the Georgia statutes by an arbitration or otherwise. In Connecticut, the only issues and the sole recourse of the taxpayer is with reference (1) to the amount of its income taxable under the Federal income tax law, and (2) the *ratio* of fair cash value of tangibles in Connecticut to fair cash value of all tangibles owned by the corporation on a given date.

There is absolutely no chance to show how much the corporation owns in stocks, in bonds, in bank, in accounts receivable, in patents, nor where the evidences of this property are located, nor their use or non-use in the business, their respective ratios as income producers or any other material factors. There is not even an opportunity to show the portion of net income referable to manufacturing and other operations in Connecticut, and yet the Connecticut court complains that no such analysis appears in the record.

The Connecticut statute says: 47 per cent. of your tangible property is here; *therefore*, 47 per cent. of all your property is here (if the statute can be regarded as a tax on property); and, also, *therefore*, 47 per cent. of your net income is here.

Could any assumption be more arbitrary, unfair or fallacious?

Stated otherwise, and remembering that we are now discussing the Connecticut statute as a tax on the Connecticut property measured by net income, the gist of the scheme is this; the value of all your *physical* property is determined solely by your net income from your *entire* assets; and, further, your physical or tangible assets not only produce *all* your net income, but they produce it, whatever their character or use may be, and whether used in your business or not, in substantially the same ratio, that is, each one thousand dollars' worth of tangible assets produces the same number of dollars of net income as every other one thousand dollars' worth of physical property; therefore, the value of your Connecticut tangible assets (being 47 per cent. of all tangible assets) is determined for purposes of taxation by the amount of 47 per cent. of your net income. In short, it makes no difference whether any part of your physical assets have been lying idle, or have been sold at a profit, or have been leased at a profit, or whether you have repaired other people's property at a profit, or whether some of these operations have been at one rate of profit and others at a different one, or whether some of them have been highly profitable and others have resulted in loss. We shall assume (and tax you accordingly) that the income producing value of every dollar of your physical assets is

substantially the same; and that your intangible assets produce nothing in net income.

As a consequence the announcement of Connecticut is that if plaintiff's net income from all sources is \$1,000,000, its physical assets are worth a certain figure, but if the income is \$10,000,000 then the same physical assets are worth ten times that figure, the character and use of intangible assets being treated as immaterial.

We submit, therefore, that it is entirely clear, not only that Connecticut is including in the basis of the tax, income from intangible assets located elsewhere, but that if Connecticut endeavors to support the tax as a tax on the tangible property in Connecticut, it cannot be valued, even for purposes of taxation, by any method involving so many material assumptions which are false.

The question of whether the tax is a tax upon net income, considered as property in itself, is a wholly different question and is elsewhere considered in this brief.

It should, however, be added in connection with any argument concerning the taxation of the *property* of foreign corporations, that this Court has never departed from the cardinal rule originally laid down in *Postal Telegraph Co. v. Adams*, 155 U. S., 688, that is, that "the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction therefore not being susceptible of exceeding the sum which might be leviable directly thereon)."

The Connecticut Court cited the above quotation from the *Postal* case (Record, pp. 47, 48), and was driven necessarily to assert that the Connecticut tax fulfilled that condition. We submit that

this is not true. In the first place, unless there is net income, there is no tax at all; and yet no one would say that all the value of the plaintiff's Connecticut property on January 1, 1916, had disappeared if the fact had been that the company had enjoyed no net income during the calendar year 1915.

If a tax is to be "dependent in fact on the value," then it must necessarily fluctuate as the value of the property in question fluctuates. But whether the plaintiff makes money or not, the value of the Hartford factory is substantially the same and its goods in process must be worth something. Connecticut would hardly assert that if there is no net income in a given year, the value of the physical property wholly disappears. Again, the tax does not fluctuate as the Connecticut tangible property rises or falls in market value or any other value, but only according to the *proportion* of tangible property in Connecticut to tangible property everywhere, on a given arbitrary date. It is not even upon an average value during the year.

The statute would be satisfied by a return showing such *proportion* without stating any values whatever. The *actual* value is of no importance.

And, suppose the plaintiff, instead of owning its goods located in its own branch stores throughout the world, should adopt the policy of selling them direct to customers. It would be entirely possible that on January 1, in any given year, practically 100 per cent. of all its tangible property would be located in Connecticut. In that event the entire net income would be allocated by the Connecticut statute to Connecticut; but the *value* of the tangible property would make no difference in the tax. If

all the tangibles are in Connecticut on January 1, 1916, then all the income is to be taxed, whether the tangibles are worth ten dollars or ten million. How then is the tax "dependent in fact on the value of its property"?

The natural, proper and simple method of making a tax "dependent in fact on the value" of the property is, that it be assessed or appraised or valued by some method and that the tax be laid upon the resulting figure. Nothing of the sort appears in the Connecticut statute. The only possible issues are the ascertainment of its net income under the Federal law and the *relative* value of Connecticut tangibles to total tangibles.

There is another test by which it appears that the Connecticut rule does not fulfill the requirements of the *Postal Telegraph* case, and which proves conclusively that there must be some sort of actual appraisal or ascertainment of value. We refer to the parenthesis above quoted from the *Postal* case to the effect that the State exaction must not be "susceptible of exceeding the sum which might be leviable directly" upon the property in question.

If the plaintiff has \$100,000 in property value in Connecticut, that is the limit of taxation (by a *property* tax). It does not appear from the cases whether the power to tax still means the "power to destroy" by taking 100 per cent. of such value, but certainly that would be the maximum. But suppose a corporation, with its factory and all its tangible property located in Connecticut on the date named by the statute, and suppose that the value of all its tangible property is \$100,000; suppose also that the net income which it enjoyed during the tax year was \$200,000, or some other

amount in excess of the value of its tangible property. Under the *Postal* case, the maximum tax which could be laid by Connecticut would be \$100,000. Yet under the Connecticut statute the entire net income of \$200,000 would be allocated to Connecticut and a tax could be laid of that amount upon the foreign corporation. Under the Connecticut statute there is no redress; no official or Board authorized to correct this strait-jacket. Indeed, in such a case it is of no importance under the statute what the actual or market or fair or assessed value of the tangible assets may be. If they are all in Connecticut on the date in question, all the net income is to be taxed.

Accordingly, it appears to be clear that the tax is not a tax dependent in fact on the value of the tangible property of the plaintiff in Connecticut. If it be said by the State that the property in Connecticut which is taxed and upon the value of which the tax is "dependent in fact" is the net income, the argument can be answered from the Record, page 49. There the Connecticut Court in reinforcing its assertion that the "tax in question complies with every requisite pointed out," says, in terms, that it is "made dependent in fact on the value of the plaintiff's *tangible* property in Connecticut at the close of its fiscal year," following up this naive statement by recital of tangible values and the calculation that the amount in dollars which the tax came to was less than two-tenths of 1 per cent. upon that value.

But what does this amount to except to show that by chance in that particular year, the amount which the tax happened to be, turned out to be less than *might* have been levied, if this had been an

ad valorem tax? The *Postal Telegraph* case says that the tax law must be so that the exaction shall not be "*susceptible* of exceeding the sum which might be leviable directly thereon."

As a matter of fact, by the necessary operation and effect of the Connecticut statute, the tax does not depend upon the value of the property produced at the Connecticut factory, nor the gross or net income arising out of such property, either as it was produced or after it had passed through other processes and had been sold, nor upon any Connecticut business, but fluctuates with two other items or elements totally disconnected with the value of property located in Connecticut, namely (1), the volume of the business and profits which arises out of plaintiff's leasing, repairing, financial and other transactions wholly outside of Connecticut; and (2) the purely accidental ratio between tangibles within Connecticut and total tangibles on a given, single, arbitrary day in the year.

This is not making the tax depend upon the *actual* value of *anything*.

III.

The Connecticut tax, considered as an excise or privilege tax, is invalid.

We first reprint, for convenience, the six paragraphs from the *International Paper Company v. Massachusetts* case (246 U. S., 135), summarizing the law:

"1. The power of a State to regulate the transaction of a local business within its borders by a foreign corporation,—meaning

a corporation of a sister State,—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

3. Consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State.

4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State.

5. A license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other states: and this because the capital stock of the corporation represents all its business of

every class and all its property wherever located.

6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property belong the jurisdiction of the State.”

We call attention also to the familiar quotation from *State Tax on Foreign Held Bonds*, 15 Wall., at page 319:

“The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways.”

We submit that there are limits to the power of a State in placing an excise or occupation or privilege or license or franchise tax upon a foreign corporation: and that, if such a tax, in its operation or effect, or by reason of the measure adopted, amounts to any exaction whatever upon extra territorial property or business, it is as certainly contrary to the due process clause as if it were expressly laid upon land in New York or upon the entire capital and business of the corporation everywhere (*Wallace v. Hines*, 251 U. S., *supra*).

What is the “local business” with respect to which Connecticut can lay a tax of one of these

classes? Clearly not more than the manufacturing, and the purely intrastate business—nothing else, unless the temporary warehousing or storage pending shipment.

It is with reference and in relation to these operations that this tax, if it is in one of these classes (herein called generally excises) must be supported to sustain the Connecticut decision.

We do not deny that Connecticut, if it should go about it the right way, could lay a tax on this plaintiff of that description. But an excise must be reasonable, it must have some sort of a rational connection with, or relation to, the privilege or occupation or license with respect to which it is established.

The amount of an excise must be proportioned to the "value of privileges granted or to the extent of their exercise, or to the results of such exercise." *Judson on Taxation*, Sec. 245.

If such a State tax is measured by the entire capital stock of the corporation or by its entire business, it is invalid under *Western Union Co. v. Kansas*, *International Paper Co. v. Mass.*, and *Looney v. Crane*. And if Connecticut had used as a measure the entire net income, the resulting invalidity must be the same. Its net income issues out of and represents all its corporate operations and property, and a tax so measured would be, we submit, "for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property including that in other States" (*International Paper Co. v. Mass.*, *supra*).

For the year 1915 the Connecticut measure of the tax took effect only upon 47 per cent. of the net income. But the next year or with another corpo-

ration it might be 60 or 80 or 100 per cent. If all the tangibles are in Connecticut on January 1, the entire net income is the measure. There is no limit or maximum to hold this so-called excise within bounds.

We repeat that *the real question in this aspect of the case, as well as from other points of view, is precisely the same as if the entire net income were the measure of the tax.* If Connecticut uses as a measure (without any maximum), anything which, in substance, takes into the basic reckoning material elements of net income which have nothing to do with Connecticut, or Connecticut operations, or which have no fair connection with, or bearing upon, them, the error is of precisely the same character, though less in degree, as a measure consisting of the entire net income.

To state it the other way around, Connecticut's tax, regarded as an excise or privilege exaction, might probably be a reasonable charge if based upon the value of goods manufactured during the year in the State, either as finished and lying in the factory, or as sold (*American Mfg. Co. v. St. Louis*, 250 U. S., 459). It might be made to fluctuate somewhat with the length of time these goods remained in storage in the State, or with the capital employed in the State, or other usual or logically reasonable measures of the extent of exercise of the privilege.

But what, instead, is the fact? Connecticut starts with the entire net income, derived in a very substantial amount from transactions which not only take place outside the State, but have no relation, or only the remotest relation, to Connecticut. Every business operation of the plaintiff during the entire year, except the actual making of typewrit-

ers, takes place outside of Connecticut (we disregard the insignificant intrastate sales, repairs, etc., as not necessary to the discussion), and yet every dollar of net income enters into the calculation.

Even if all the net income from all the sales of the goods produced at Hartford were attributable to manufacture alone, this measure would be monstrous as determining an excise, for the transactions other than sales are so material a factor. Connecticut, in a recognition more or less conscious of this anomaly, says, "We will not use all of the net income in all cases. We will use all of it if all your tangible property is in Connecticut on a given day: otherwise we will reduce the measure somewhat. But in either event we do not care whether or not the tangible property, located in Connecticut or outside, was manufactured in Connecticut, by virtue of our Connecticut privileges, or whether it was so manufactured by you or by someone else, or whether it has ever been here. We are, to be sure, measuring a privilege tax, but the tangible assets determining the amount need not have a material connection, or any connection, with your exercise of those privileges, provided their physical location is here on the one day at the end of your fiscal year."

It is true that by thus taking the entire net income as the primary basis, the tax fluctuates in part as the income from sales of the Hartford products rises or falls, and to this we are not taking exception. But the vice of the measure adopted is that the tax also fluctuates as the income rises or falls upon a multitude of transactions having nothing whatever to do with Connecticut privileges: and the degree to which the income from these intermingled fluctuations shall result in a tax is at last

determined not by the plaintiff's activities or the volume of its operations in exercising those Connecticut privileges, but by the inert mass of physical things which fortuitously happen to lie in Connecticut or elsewhere on the given date.

We submit that it is wholly unreasonable to fix a tax upon a Connecticut privilege or occupation by a measure into which the results of other privileges and of occupations in other States and countries have so largely entered.

Nor is there any maximum amount to safeguard the foreign corporation from extortion.

If the charge were based upon the volume of the plaintiff's user of the Connecticut privilege, or upon the results of Connecticut manufacture, possibly no maximum would be necessary. But it is not: and if an excise or privilege tax is to be measured by anything (*e. g.*, the entire capital stock), which is not reasonably related to the exercise of the privilege, some stated sum, not out of proportion to the presumable value of the privilege, must be set to keep the charge from, so to speak, running amuck. Here, as it is entirely possible that the whole, or a great part, of the entire net income may be the measure, we say a maximum is essential to save this tax.

In *General Railway Signal Co. v. Virginia*, 246 U. S., 500, this Court said:

"Prescribed fees do not vary in direct proportion to capital stock, and a maximum is fixed. * * * The two characteristics of the statute just referred to must be regarded as sufficient to save its validity. It seems proper however to add that the case is on the border line."

It is also worth remarking that there is no minimum. Whether net income results or not, Connecticut has afforded protection to the plaintiff's property and has permitted the manufacturing privilege. It may be said that the State is so good natured as not to charge its excise fees for privileges unless the foreigner can make a profit, but, on the other hand, the omission looks very much more as if Connecticut did not *intend* an excise tax at all. The protection and the privilege are the same, irrespective of profit.

It may be urged that Connecticut has an absolute right to permit or exclude a foreign corporation from manufacturing in the State. But can it be possible that Connecticut can say to a corporation already established in accordance with her laws, "Hereafter you shall pay a tax to us, dependent largely upon your profits in operating all over the world, and if you don't like this you can move out"? Or that she should say, "You must pay a percentage upon such part or all of your entire net income as we see fit"?

If a State can say this, Michigan can virtually forbid the Steel Corporation from operating its mines there located, Illinois from operating its furnaces, Pennsylvania from finishing the raw material into steel, and the structure of a great industrial factor in the interstate commerce of the country would be in ruins.

We are aware that manufacturing alone has been said not to be commerce. Theoretically this may be so. Practically it ought to be recognized that it is not true.

Men do not manufacture simply to store the products or to deal them out over the counter to the

local inhabitants. We are either a nation, with national industries to which State boundaries have no significance, or we are only a bundle of separate, quarreling, selfish, sovereignties.

Even if some cases must be overruled, some ideas recast, and the definition of commerce revised and broadened, it is time to do so: and it is better to face the facts than to decide cases on the fictitious basis that edicts of the States upon permission to manufacture cannot be deemed to affect interstate commerce.

Manufacture is as essential and as directly a part of interstate commerce as the sales of its products or their transportation to the buyer.

In *American Mfg. Co. v. St. Louis, supra*, this Court pointed out that it would be a ruinous policy for a manufacturer, for ulterior purposes, to make goods and lock them up permanently in warehouses. Surely the States are not entitled to any more latitude than is allowed them by that decision. Missouri, moreover, did not venture to tax upon the basis of sales of any goods not manufactured within her borders (*American Mfg. Co. v. St. Louis*, 238 Mo., 267).

But it is not necessary to rest this point upon any revision or extension of the technical definitions of commerce. Nor do we have to face the question of the State's power to prevent, at will, the original entrance of a foreign corporation requesting local privileges. We have the case of a foreign corporation long established, having entered by the express sanction of Connecticut, at a time prior to the legislation in question, and still in good standing, with an extensive manufacturing establishment, and a system of shipments in interstate commerce both covering raw materials into Connecti-

cut and finished goods out of it, all correlated and linked into the interstate business which is its chief occupation. This is a situation which has long been invited and fostered by Connecticut. It is entirely parallel to the International Paper Company situation in this respect.

In *Southern Railroad Company v. Greene*, 216 U. S., 400, this Court said:

"It is sufficient for the present purpose to say that we are not dealing with a corporation seeking admission to the State of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that State; nor with one which has come into the state upon conditions which it has since violated. In the case at bar we have a corporation which has come into and is doing business within the State of Alabama, with the permission of the state and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the permission and sanction of the laws of the state."

The Connecticut tax, considered from the standpoint of a tax for the privilege of doing business domestic to Connecticut, is an unlawful restraint upon the Federal rights of the plaintiff as a foreign corporation and a substantial interference with interstate commerce because it seeks to disrupt that situation or as the alternative to force the consent of the plaintiff to an illegal tax.

The payment of the tax, to be sure, is not *in terms* made a condition of its right to continue the local or intrastate business. But if the tax is not paid

by a given date, which is a date prior to any sort of hearing or opportunity to apply for relief (Secs. 23, 27), a lien for the amount of the tax as laid by the Tax Commissioner, with five per cent. added as a penalty and with interest at the rate of three-quarters of one per cent. per month, is to be filed upon the real estate of the corporation in Connecticut.

Thus the corporation must either submit to extraterritorial taxation or be deprived of its Connecticut property, worth upwards of \$2,000,000, through foreclosure of the lien, or abandon the State and recast its entire manufacturing organization at heavy expense and loss. The power of the State does not extend so far. This procedure practically ousts from Connecticut a corporation lawfully there; a "person" entitled to due process, and a "person within the jurisdiction," within the meaning of the Fourteenth Amendment, and in good standing so far as concerns all regulations within the power of Connecticut to prescribe, and all that the State has in fact prescribed.

Since 1903 at least, the Connecticut statutes have provided (Chap. 194, Public Acts of 1903; Sec. 3526, Revised Statutes of 1918) that any foreign corporation (with certain exceptions not here material) may "purchase, hold, mortgage, lease, sell and convey real and personal estate in this State for its lawful uses and purposes, and such real estate and other property as it may acquire by way of foreclosure or otherwise in payment of debts due such corporation."

In *Western Union Telegraph Co. v. Kansas*, *supra*, this Court said (p. 34), quoting from *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S., 1:

"We are aware that, in *Paul v. Virginia* (8 Wall. 168), this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' Art. 4, sect. 2. *That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show that, if it had been, very different questions would have been presented.*" (Italics are the Court's.)

Page 35:

"Can such a regulation be deemed constitutional any more than one requiring the company, as a condition of doing intrastate business, that it should surrender its right, for instance, to invoke the protection of the Constitution when it is proposed to deny it the equal protection of the laws?"

Page 37:

"It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified and the business of the country thrown into confusion, but each State would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits. We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done

or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States."

Since that decision it has been made clear that the principles of that case are equally applicable to manufacturing or trading corporations engaged in interstate commerce. *International Paper Co. v. Mass.*, *supra*, at p. 142; *Looney v. Crane Co.*, *supra*. In the *International Paper Co.* case, this Court, we submit, took another step beyond *Western Union Co. v. Kansas*, for in the *Paper Co.* case there was no provision of the Massachusetts law making payment of the tax expressly a condition of its right to continue in business in the State. We believe that it clearly appears from the recent decisions of this Court that the doctrine formerly stated, to the effect that a State has an absolute and unqualified power to prevent foreign corporations from entering upon local business, and as a consequence absolute power to oust them from local business at any time unless they comply with such terms, of any character whatever, as the State may impose, can no longer be sustained, at least with reference to the power to oust a corporation engaged chiefly in interstate commerce, by legislation passed after the establishment of the foreign corporation in the State and the acquirement by that corporation of permanent property interests. *Southern Railroad Co. v. Greene*, *supra*.

In *Baltic Mining Co. v. Commonwealth*, 207 Mass., 381, the State Court endeavored to limit the modern doctrine to corporations of the character of public utilities owning large amounts of property of a permanent character and not readily salable at a fair price for other purposes. It is submitted, however, that any such distinction is not tenable and will soon be recognized as following the original rule into history as inapplicable to the practical facts of present business conditions and the interest of local communities in the economical and convenient service thus ensured. We call attention to the able discussion of this subject, Chapter IX of *Harvard Studies in Jurisprudence*, Volume II, "The Position of Foreign Corporations in American Constitutional Law," by Mr. Gerard C. Henderson, in the course of which the author says at page 153:

"Undoubtedly there is language in the opinion of Mr. Justice Day in the *Greene* case supporting this view. Yet a distinction based on the amount and character of the property owned by a corporation is hardly relevant to the question of its presence within the state. Between the case of a small business corporation which has established a branch store within the state, and a railroad with millions invested in permanent roadbed, there is a difference only in degree. To base a distinction on this difference would be to introduce an entirely new principle into our public law, that the wealth and magnitude of a corporation determines the degree of protection to which it is constitutionally entitled. The argument that railroad and telegraph property, being specially adapted to one kind of business only, cannot be readily sold, so that in these cases the

hardship of expulsion or discrimination is exceptionally severe, is of little value. It is based on the assumption that if a state orders a railroad incorporated in another state to cease doing business, the railroad must forthwith sell its tracks and stations as junk, and break up its right of way into farm lots. In fact, the procedure would probably be for it to sell the property at its true value to a domestic corporation, which would continue to operate it as a railroad. But even if the fact which this argument assumes were true, it could hardly be made a ground of constitutional distinction. Whether a corporation, as a person, is exposed to arbitrary deprivation of property by expulsion, cannot depend on whether it is threatened with a loss of a thousand dollars or a million, or whether the property which is jeopardized consists of railroad tracks, branch stores, or goodwill. In each case it is property, and the corporation has been deprived of it."

In *Looney v. Crane Co.*, 245 U. S., at page 190, this Court said:

"It is thus manifest on the face of all of the cases that they in no way sustained the assumption that because a violation of the Constitution was not a large one it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution."

We submit, therefore, that the power of the State does not extend so far; that (whatever may now remain of its power of absolute exclusion of corporations who have never entered the State)

it cannot, at its whim, or to enforce a tax unlawful except by consent extorted from the corporation, compel a foreign corporation, engaged almost wholly in interstate commerce and already permanently established by investments authorized and even invited by the State, to a choice between surrendering all property and business and rights in Connecticut, and paying this tax; and that it would be a denial of the equal protection of the laws and a deprivation of property without due process, as well as an unlawful interference with interstate commerce, to permit this tax to be thus enforced.

Connecticut is grasping for a share in every transaction of the plaintiff, everywhere and of every character. Her lesson of self-restraint is yet to be learned. Either she ought to confine her appetite to Connecticut production or she should set up some definite maximum of charge so that its reasonableness can be intelligently judged.

IV.

The formula for allocating income to the State of Connecticut in necessary operation directly burdens interstate commerce and exacts a tax upon net income and property located without the State.

The crux of the invalidity of the Connecticut Act, whether it be considered a property tax, an income tax, or an excise tax, is expressed in this head-note.

This feature will be discussed here, however,

solely from the standpoint of interpreting the Act as an attempt to levy an excise. That is what the State Court has called it.

We do not think that we are misinterpreting that decision in stating that it recognizes that if the tax is to be upheld at all it must be upon the theory that it is a valid imposition of an excise: that it cannot be sustained upon the theory of a straight property or income tax.

Much that has been previously said herein bears upon and substantiates the assertions in this head-note. There are a few other observations, however, which should not be ignored.

Preliminarily, it should be remembered that this Court is not bound by the characterization of the nature of the tax by the State Court. If in force and effect the law directly burdens interstate commerce, or reaches property located out of the State, it is invalid, regardless of whether it is called an excise tax in the Act or by the State Court (*Galveston, etc., v. State of Texas*, 210 U. S., 217).

The sole basis for the argument in support of the contention that it is an excise tax is, of course, the assertion that net income is used only as a means of measuring the value of the privilege of doing business within the State. But even if so, in adopting and applying this method, obvious limitations exist within the confines of which the State law must keep.

A large business operating in interstate and intrastate commerce, and exercising the privilege of doing business in all the States, as a going business, must be considered as a whole.

If, from the point of view of a particular State, a portion of its net income is an appropriate meas-

uring rod of the value of doing business in that State, then, from the same viewpoint, it must follow that the entire net income represents the collective value of the privilege of doing business in all the States. The entire net income being the limit for all, it is obvious that no one State can consistently allocate the entire net income to itself.

Its allocated portion of net income for the purpose must be something less than the whole, and at the same time no greater than what may reasonably appear to be a just portion, having regard for the value of the privilege of doing business in other jurisdictions, *measured by the same standard*. If 100 per cent. of the entire net income is the measure for doing business everywhere, Connecticut's portion should approximate only such percentage as, when added to the allocated percentages of all the other jurisdictions, constitute the 100 per cent. This is true, for if it goes beyond this point, it invades fields beyond its jurisdiction, and actually taxes property and the doing of business elsewhere.

Is the method of apportionment adopted by Connecticut calculated to limit its share to its just percentage? Decidedly not. Under the system of allocating by comparison of tangibles, it is conceivable that a foreign corporation, doing business in every State in the Union, and confining its operations in Connecticut to manufacture only, might be taxed upon its entire net income. Such a corporation, manufacturing in Connecticut and selling to wholesalers and jobbers from its offices in New York and elsewhere, might have all its tangibles in Connecticut and yet the greater portion of its income would be realized elsewhere. Another corpo

ration doing the identical business and earning the same net income, but only leasing a factory in Connecticut, would be taxed considerably less, and still another corporation, doing the same business, without manufacturing at all, but merely buying from a manufacturer located outside of Connecticut, and selling the product so obtained from offices in Connecticut through the mail order system, delivery being made from the factory, might not be taxed at all. These illustrations serve to show that an allocation by a comparison of tangibles only does not and cannot reflect the income producing capacity of any going business.

Great stress is laid by the Court below upon the fact that all of the plaintiff's manufacturing is done in Connecticut, and it finds much comfort in the circumstance that much of the gross income is realized from the sale of the manufactured article. These circumstances in no way can justify an allocation upon the basis of a comparison of tangibles. The tax is not upon the privilege of manufacturing, such as was before this Court in *American Mfg. Co. v. St. Louis*, *supra*. It cannot be supported on that theory, for the income which is reached includes income from property not manufactured in Connecticut, but bought outside of Connecticut and sold outside of Connecticut. Furthermore, from the Record it appears that the business of the plaintiff is not confined to manufacturing in Connecticut and selling the articles so manufactured. It also buys and sells articles not made by itself and also leases property and performs services in the form of making repairs to property. As to that part of its business, its tangibles in Connecticut contribute nothing towards the earning of income. Hence, when the income

from these items is included in the portion of income upon which the tax is allocated to Connecticut, Connecticut necessarily exceeds its just proportion of the entire net income, and, in fact, taxes something which, *under its own theory of measurement by net income*, some other State or jurisdiction should have the exclusive right to tax as business done.

It is conceivable, in the use of net income as a measuring rod for the value of the privilege of doing business within the State, that after deducting income from property not used in the business, a comparison of the value of all assets within the State with the total value of all assets, wherever existing, might adequately and fairly approximate the appropriate figure for each jurisdiction. For then every element through which income is produced, both tangible and intangible, would enter into the computation, and thus ensure against disproportionment. Other methods of allocation which do not involve a comparison of property values used in the business might approximate the same result, and therefore be just as fair, but we are not dealing with that situation here. We are dealing with a segregation of income on the basis of comparative values of property. To do that with justice to the taxpayer, and at the same time with adequate consideration for the right of the State, it is important that the value of all property used in the business, both tangible and intangible, should appear both above and below the line of the fraction, and that income realized from investments not used in the business should be excluded from the computation.

V.

The decision in United States Glue Company against Oak Creek, 247 U. S., 321, considered in the prevailing opinion of the Connecticut Court as a controlling authority in favor of the constitutionality of the Act, has no application.

In the dissenting opinion of Mr. Justice Wheeler, the inapplicability of the *Glue Company* case to the case at bar is tersely stated and there is little to add to his discussion.

Similarly the New York Court, in a well considered opinion in *Alpha Portland Cement Co. v. Knapp, supra*, also points out the limitations of the decision in *U. S. Glue Co. v. Oak Creek, supra*, and discloses the lack of pertinency of that decision to the facts in this case.

Hence a detailed discussion of the *Glue Company* case would only result in unnecessary repetition. We believe, however, it would not be amiss to call to the attention of this Court two distinguishing features which are, perhaps, not emphasized either by Justice Wheeler or by the New York Court.

The first of these is that the *Glue Company* case involved the question of the right of a state to tax income of a *domestic* corporation. Obviously the case presented a different question from the one presented here, which involves the right to tax the net income of a *foreign* corporation, for it may be conceded that a State may tax the entire income of a domestic corporation, as the situs of the income is presumed to be within the State of corporate origin, *Cream of Wheat Co. v. Grand Forks*, 251 U. S., 40.

The other distinguishing feature which is also of outstanding importance is the fact that the *Gluc Company* case in no way involved a determination of the power of the State to allocate income through the process of comparing selected elements of the taxpayer's property. The question of allocating net income was not before this Court in that case at all. Even if it had been involved, the Connecticut and Wisconsin schemes of allocation are radically different. The two items of net income which formed the subject of the litigation were admittedly derived from interstate commerce without any regard to points of allocation. It was assumed by all parties that these two items had their situs in Wisconsin.

The sole point decided is stated by Mr. Justice Pitney as follows:

"Stated concisely, the question is whether a State, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States."

VI.

This Court cannot rewrite the law. Its unconstitutional features are inseparable; it is either all good or all bad.

In *Oklahoma v. Wells Fargo & Co.*, 223 U. S., 298, this Court said, at the bottom of page 301:

"It was adjudged, however, that the bill cannot be maintained for want of a tender

of so much of the tax as would have fallen upon the receipts from commerce wholly within the state. But that requirement hardly can be made in this case, which is not like one where the law simply fails to allow certain property deductions. *People's National Bank v. Marye*, 191 U. S., 272. Whether the statute could be construed as separable of course would be ultimately for the state court in any event. *Telegraph Co. v. Texas*, 105 U. S., 460. But we see no possible construction on which it could be upheld without being so remodeled that it would be mere speculation whether the legislature would have passed it in the new form. * * * Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

VII.

The writ of error should be sustained and the judgment of the State Court corrected in accordance therewith.

Respectfully submitted,

CHARLES STRAUSS,
ARTHUR L. SHIPMAN,
ARTHUR M. MARSH,
EUGENE D. BOYER,

For the Plaintiff-in-Error.



APPENDIX.

CHAPTER 292.**Taxation of Railroad, Street Railway,
Water, Gas, Electric, Power, Stock
Insurance and Miscellaneous Corpo-
rations.****PART I.****RAILROAD AND STREET RAILWAY CORPORATIONS.**

SECTION 1. Every corporation operating a steam or electric railroad, or street railway, and carrying on business for profit in this state, shall pay annually a tax upon the gross earnings from all sources from operations in this state, that is, the gross operating income as defined by the interstate commerce commission of the United States in the case of railroads. No deduction shall be made from such gross earnings for any commission, rebate, or other payment, except refund resulting from an error or overcharge.

SEC. 2. I. The term "authorized agent or officer," as used in this act, shall include any trustee, mortgagee, or receiver in possession of or operating any such railroad or railway in the state. II. Every such corporation, on or before the thirtieth day of September in each year, shall return to the tax commissioner a statement, under the oath of its treasurer or an authorized agent or officer, specifying: (1) The name of every steam or electric railroad or street railway operated by such

corporation during the year ended the thirtieth day of June next preceding; (2) the number of miles of all railroad or railway tracks, including yard tracks, sidings, branches, and spurs, which were operated by such corporation at any time during the year ended said thirtieth day of June, and the number of miles within this state of all such railroad or railway tracks, including yard tracks, sidings, branches, and spurs so operated; (3) the amount of gross earnings of such corporation from all sources from its operation during the year ended said thirtieth day of June, or the portion of such year that such corporation has carried on business in this state; (4) the assessed value of all real estate in this state assessed in the name of such corporation, or against a corporation all of whose property is operated by it, with a specific list of the same and the amount of taxes paid upon any such real estate, in any town in the year ended said thirtieth day of June.

SEC. 3. 1. Every such corporation shall be taxed upon the amount of gross earnings from all sources from operations in this state, as follows: (1) In case of a corporation operating a railroad or railway which is entirely within the limits of this state, the amount of gross earnings from all sources from operations; (2) in case of a corporation operating a railroad or railway when only part of such railroad or railway lies in this state, such portion of the amount of gross earnings from all sources from operations as is represented by the ratio of the number of miles of tracks, including yard tracks, sidings, branches, and spurs operated in this state during the year ended said thirtieth day of June, to the number of miles of such tracks, including yard

tracks, sidings, branches, and spurs, operated by it during such year. II. The rate of the tax on gross earnings of steam or electric railroads, other than street railways, shall be three and one-half per centum; the rate of the tax on gross earnings of street railways shall be four and one-half per centum. III. The amount of taxes paid during the year ended said thirtieth day of June, in any town in this state, on the real estate not used exclusively in the business of such corporation, or of any corporation all of whose property is operated by such corporation, shall be deducted from the amount of the tax upon such gross earnings.

SEC. 4. The board of equalization, from such statement, or from other information, shall annually determine the amount of the gross earnings from operation of every such corporation for the year ended said thirtieth day of June, or the portion of such year that such corporation has carried on business in this state, and the amount of taxes upon real estate paid by every such corporation, or by a corporation all of whose property is operated by it, found to be deductible as provided in section three, and shall notify each such corporation of such amount on or before the fifteenth day of October in such year. If any such corporation is aggrieved because of the amount so determined, said board, upon application of such corporation in writing within ten days thereafter, shall fix a time when and place where such corporation may be heard and show cause why such amount should be changed.

SEC. 5. The board of equalization, during the first ten days of November in each year, shall make a list of corporations designated in section one, with the amount of gross earnings of each such cor-

poration from operations in this state, as determined pursuant to the provisions of section four for the year ended June thirtieth next preceding, and shall lay a tax upon such corporation at the rate per centum of such gross earnings as provided in section three. Said board of equalization shall enter the amount of the tax against the name of such corporation and the amount of any deductions for taxes on real estate, and shall certify to the correctness of such list and deliver a copy thereof to the treasurer. Said board shall forthwith mail to such corporation a statement of the amount of such tax. Failure to receive such statement shall not excuse the nonpayment of such tax. Such tax, less the amount of deductions for real estate taxes as determined pursuant to the provisions of section four, shall be payable the fifteenth day of said November. All taxes due to the state from such corporation shall be a lien on the property upon which such tax is laid until the same shall be paid and shall take precedence over other incumbrances. If such tax is not paid on or before the twenty-fifth day of said November, interest shall be charged from the fifteenth day of said November at the rate of eight per centum per annum until paid if payment shall be made before commencement of legal proceedings for recovery of such tax, or at the rate of ten per centum per annum if payment shall be made after commencement of such proceedings.

SEC. 6. The tax provided for in this act upon the gross earnings of every corporation included in section one shall be in lieu of all other taxes in this state for the year ended the thirtieth day of June of the year in which such statement is required to be made, and of its rights, franchises, funded and floating debt, and property in this state, and prop-

erty of every corporation, which property is operated in this state by any such corporation so liable to such tax upon gross earnings, but the real estate in this state owned by such corporation, or by a corporation whose property is operated by it, when not used exclusively for railroad purposes, shall be assessed and taxed where it is located. The owner of any share of stock of any corporation designated in section one and of any such corporation the property of which is operated by it, and the owner of any bond, note, or other evidence of indebtedness of any such corporation, if incorporated under the laws of this state, and of any corporation included in section one if so incorporated, all of whose property in this state is operated by any such corporation liable for such tax upon gross earnings, shall be exempt from taxation thereon.

SEC. 7. If the tax provided for under the provisions of part one is not paid within ten days after the same shall become payable, the attorney-general in the name of the state shall apply to the superior court for Hartford county, or to any judge thereof, for an order for payment of such tax, and in such application shall set forth the amount of such tax, nonpayment thereof, and a general description of the property and choses in action of such corporation upon which such tax is laid. Thereupon the court or such judge, as the case may be, shall appoint a time for a hearing upon such application and shall order reasonable notice of the pendency of the same and time of hearing thereon to be given to such corporation. Upon such hearing, the court or such judge shall determine the amount of tax due and order payment thereof, and execution may be issued for the collection of such amount, which shall be served and returned as in civil actions.

SEC. 8. If, during any year ended on the thirtieth day of June, any steam or electric railroad or street railway lying wholly or partly within this state was not operated by the corporation owning it, or by any other corporation liable to a tax upon gross earnings under the provisions of part one, the board of equalization, on or before October fifteenth in such year, shall determine a fair valuation of such railroad or railway property lying within this state for the purpose of taxation as of June thirtieth next preceding, and the corporation owning such property, or its authorized agent or officer, shall pay to the state an annual tax of one per centum of such valuation.

SEC. 9. Sections 2423, 2424, 2425, 2427, 2428, 2429, 2430, 2431, 2432, 2442, and 2443 of the general statutes, chapter 173 of the public acts of 1903, chapters 115 and 247 of the public acts of 1905, chapter 204 of the public acts of 1907, chapter 283 of the public acts of 1911, and chapter 207 of the public acts of 1913, and such portions of sections 2441 and 3822 of the general statutes, with amendments thereto, as are inconsistent with the provisions of this act, are hereby repealed.

PART II.

WATER, GAS, ELECTRIC, AND POWER COMPANIES.

SEC. 10. The term "company" as used in part two of this act shall include persons, partnerships, associations, companies, and corporations, except incorporated municipalities.

SEC. 11. Every company, the principal business of which is manufacturing, selling, and distribut-

ing gas or electricity to be used for light, heat, or motive power, or operating a system of water works for selling and distributing water for domestic or power purposes, shall pay an annual tax upon gross earnings from operations in this state. No deduction shall be allowed from such gross earnings for any commission, rebate, or other payment, except a refund resulting from an error or overcharge. Every such company shall, on or before the thirtieth day of September in each year, return to the tax commissioner a statement under the oath of its treasurer, or the person performing the duties of treasurer, or of an authorized agent or officer, specifying the name and location of such company, the amount of gross earnings from operations for the year ended the thirtieth day of June of the year in which such statement is required, or the portion of such year that such company has carried on business in the state, the number of miles of water pipes, gas mains, or electric wires operated by such company within this state on said thirtieth day of June, and the number of miles of water pipes, gas mains, or electric wires wherever operated by such company on said date.

SEC. 12. Every company specified in section eleven shall be taxed upon the amount of gross earnings from operations at the rate of one and one-half per centum as hereinafter provided. Gross earnings, for the purpose of assessment and taxation, shall be as follows: In case of a company carrying on business entirely within this state, the amount of gross earnings from operations; in case of a company carrying on business, a part of which is outside of this state, such portion of the amount of gross earnings from operations determined

under the provisions of section eleven as is represented by the ratio of the number of miles of water pipes, gas mains, or electric wires operated by such company within this state on the thirtieth day of June next preceding to the number of miles of water pipes, gas mains, or electric wires operated by such company on said date.

SEC. 13. The board of equalization, from the statement required under the provisions of section eleven, or from other information, shall determine, annually, the amount of gross earnings of every company included under the provisions of section eleven for the year ended June thirtieth next preceding, or the portion of such year that such company has carried on business in the state, as provided in section twelve, and shall notify such company of such amount on or before the fifteenth day of October in said year. If any such company is aggrieved because of the amount so determined, said board, upon application of such company in writing, within ten days after said fifteenth day of October, shall fix a time when and place where such company may be heard and show cause why such amount should be changed.

SEC. 14. The board of equalization, during the first ten days of November in each year, shall make a list of the companies designated in section eleven, with the amount of gross earnings from operations in this state for said year, as determined pursuant to the provisions of section twelve, and shall lay a tax upon each such company at the rate per centum of such gross earnings as provided in section twelve. Said board shall enter the amount of the tax against the name of such company and shall certify to the correctness of such list and deliver a copy

thereof to the treasurer. Said board shall forthwith mail to such company a statement of the amount of such tax. Failure to receive such statement shall not excuse nonpayment of such tax. Such tax shall be payable on the fifteenth day of said November. Any tax due to the state from any such company shall be a lien on the property upon which such tax is laid until the same shall be paid, and shall take precedence over any other incumbrance. If such tax is not paid on or before the twenty-fifth day of said November, interest shall be charged from the fifteenth day of said November at the rate of eight per centum per annum until paid if payment shall be made before commencement of legal proceedings for recovery of such tax, or at the rate of ten per centum per annum if payment shall be made after commencement of such proceedings.

SEC. 15. If the tax under the provisions of part two is not paid within ten days after the same shall become payable, the attorney-general in the name of the state shall apply to the superior court for Hartford county, or to any judge thereof, for an order for payment of such tax, and in the application shall set forth the amount of such tax, nonpayment thereof, and a general description of the property and choses in action of such corporation upon which such tax is laid. Thereupon the court or such judge, as the case may be, shall appoint a time for a hearing upon such application and shall order reasonable notice of the pendency of the same and time of hearing thereon to be given to such corporation. Upon such hearing, the court or such judge shall determine the amount of tax due and order payment thereof, and execution may be issued

for the collection of such amount, which shall be served and returned as in civil actions.

SEC. 16. The tax upon gross earnings as provided in part two shall be in lieu of all license, corporate excess, or income taxes payable to the state. The owner of any share of stock, bond, or other evidence of indebtedness of any corporation liable to the tax upon gross earnings as provided in part two shall be exempt from taxation thereon.

PART III.

STOCK INSURANCE COMPANIES.

SEC. 17. Every insurance company having capital stock, incorporated under the laws of this state and doing business in this state, on or before the fifteenth day of July, 1916, and annually thereafter, shall pay to the treasurer a tax on its corporate franchise equal to one-half of one per centum on the market value of each share of its capital stock, as of October first next preceding, as determined by the board of equalization under the provisions of section 2332 of the general statutes, provided from the value of the capital stock of such company so determined there may be deducted the amount invested in bonds issued by the state, and in case of such deduction the tax as aforesaid shall be paid on the portion of the value of the capital stock remaining. There shall be no other deduction from the gross amount of such tax, and such tax shall be distinct from the tax provided in section 2331 of the general statutes as amended by chapter 204 of the public acts of 1903, chapter 54 of the public acts of 1905, and chapter 7 of the public acts of 1907.

SEC. 18. If any such company shall fail to pay the tax required under the provisions of part three within the time limited, it shall forfeit to the state twice the amount of such tax.

PART IV.

MISCELLANEOUS CORPORATIONS.

SEC. 19. The term "company" as used in this part shall include every corporation, joint stock company, or association carrying on business in this state which is required to report to the collector of internal revenue for the district in which such company has its principal place of business for the purpose of the assessment, collection, and payment of a income tax, except insurance and trust companies, state banks, savings banks organized under the laws of this state, banking institutions organized under the laws of the United States and located in this state, express companies carrying on business on steam or electric railroads or street railways, steam or electric railroad or street railway corporations, companies whose principal business in this state is furnishing, leasing, or operating dining, sleeping, chair, parlor, refrigerator, oil, stock, fruit, or other cars, corporations whose principal business is manufacturing, selling, and distributing illuminating or heating gas, or electricity to be used for heat, light, or motive power, or water for domestic or power purposes, telegraph, cable, and telephone companies.

SEC. 20. Each such company, except as provided in section nineteen, shall pay a tax annually to the

state upon the net income for its fiscal or calendar year next preceding, as hereinafter provided, upon which income such company is required to pay a tax to the United States. Such company subject to the tax imposed under part four shall render to the tax commissioner, on or before the first day of April of each year, under oath or affirmation of its president, vice-president, or other principal officer, and of its treasurer or assistant treasurer, a true copy of the last return made to the collector of internal revenue, of the annual net income arising or accruing from all sources in its fiscal or the calendar year next preceding, stating: (1) The name and location of the principal place of business of such company, the state under the laws of which organized, and the date thereof; the kind of business transacted and a list of all subsidiary companies, if any, with the location of the principal place of business of each; (2) the amount of its paid-up capital stock outstanding, or if no capital stock, its capital employed in business, at the close of the year; (3) the total amount of its bonded and other indebtedness at the close of the year; (4) the gross amount of its income, received during such year from all sources, and, if organized under the laws of a foreign country, the gross amount of its income received within the year from business transacted and capital invested within the United States; (5) the amount of its ordinary and necessary expenses paid out of earnings in the maintenance and operation of the business and properties of such company, stating separately all rentals or other payments required to be made as a condition to the continued use or possession of property, and, if organized under the laws of a

foreign country, the amount so paid in the maintenance and operation of its business within the United States; (6) the amount of losses sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property; (7) the amount of interest accrued and paid within the year on its bonded or other indebtedness not exceeding one-half of the sum of its interest-bearing indebtedness and its paid-up capital stock, outstanding at the close of the year, or if no capital stock, the amount of interest paid within the year on an amount of indebtedness not exceeding the amount of capital employed in the business at the close of the year, or in case of a company organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded or other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, or if no capital stock the amount of capital employed in the business at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States bears to the gross amount of its income derived from all sources within and without the United States; (8) the amount paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, and, separately, the amount so paid by it for taxes imposed by the government of any foreign country; (9) the net income of such company after making the deductions authorized; (10) the amount of taxes paid upon its income to the internal revenue department for the year next preceding the one for which such return is made;

(11) in case of a company which carries on business outside the state, the fair cash value of its real estate and tangible personal property in each town in this state, and the fair cash value of its real estate and tangible personal property located outside this state; (12) in case of a company deriving profits principally from the holding or sale of intangible property the gross receipts from its business within and without this state and the gross receipts from its business within this state.

SEC. 21. If the amount of the annual net income as returned by each such company to the collector of internal revenue is changed or corrected by the commissioner of internal revenue or by other official of the United States, such company, within ten days after receipt of notification of such change or correction, shall make return under oath or affirmation to the tax commissioner of such changed or corrected net income upon which the tax is required to be paid to the United States. If any deduction is made from the net income as returned, the comptroller shall draw his order in favor of such company on the treasurer, on the voucher of the tax commissioner for the amount of any tax paid upon such deduction, or if any addition is made, such company shall, within thirty days after receipt of notice from the tax commissioner of the amount of such addition, pay the tax thereon.

SEC. 22. If such company carries on business outside of this state, a portion of the net income on which the tax is imposed by the United States shall be apportioned to this state as follows: In case of a company deriving profits principally from

the ownership, sale, or rental of real estate, and in case of a company deriving profits principally from the sale or use of tangible personal property, such proportion as the fair cash value of its real estate and tangible personal property in this state on the date of the close of the fiscal year of such company in the year next preceding is to the fair cash value of its entire real estate and tangible personal property then owned by it, with no deduction on account of any incumbrance thereon; in case of a corporation deriving profits principally from the holding or sale of intangible property, such proportion as its gross receipts in this state for the year ended on the date of the close of its fiscal year next preceding is to its gross receipts for such year within and without the state.

SEC. 23. The tax commissioner, on or before the first day of July in each year, shall make a list of companies subject to the tax upon their net incomes, with the amount of such net incomes taxable in this state, determined as aforesaid, and a tax is hereby laid on each such company of two per centum of such net income, and the tax commissioner shall enter the amount of such tax against the name of each such company. He shall certify to the correctness of such list and said amounts, and deliver a copy thereof to the treasurer, who shall collect such tax in the manner and with the powers provided in the general statutes for the collection of taxes in towns. The tax commissioner shall forthwith mail a statement of the amount of such tax to each such company, but failure to receive such statement shall not excuse nonpayment of such tax. Such tax shall be payable on or before the first day of August in such year, and to any

sum or sums due and unpaid after the first day of August in any year, after ten days' notice and demand thereof by the treasurer, shall be added the sum of five per centum on the amount of any tax unpaid, and interest at the rate of three-fourths of one per centum per month upon such tax from the time the same became due, provided, in case of failure to make such return, or in case of false or fraudulent return, the tax commissioner, upon discovery thereof at any time within three years after the same is due, shall make a return of such taxable net income, and the tax thereon shall be paid by such company upon notification of the amount thereof. Such tax, if unpaid, shall constitute a lien upon the real estate of such company within this state, such lien to be in force from the filing of a certificate, signed by the treasurer, in the land records of the town wherein such real estate is situated until such tax and interest is paid.

SEC. 24. Any such company which fails to make any return required by the provisions of part four, or renders a false or fraudulent return, shall be liable to a penalty of not more than ten thousand dollars, to be paid to the state, and to be collected in a civil action brought in the name of the state in Hartford county, and any person or any officer of any such company who makes a false or fraudulent return or statement with intent to defeat or evade payment of the tax required by the provisions of part four shall be fined not more than two thousand dollars, or imprisoned not more than one year, or both.

SEC. 25. If any such company fails to render any return required by the provisions of part four,

or renders a false or fraudulent return, the tax commissioner, according to the best information obtainable, shall make such return, according to the form prescribed, of the income liable to a tax, shall lay such tax on the amount so determined, and in case of false or fraudulent return or valuation shall add one hundred per centum to such tax, or in case of failure to make a return, or to verify the same, he shall add fifty per centum to such tax. The amount so added to the tax shall be collected at the same time and in the same manner as the tax, unless such failure or falsity is discovered after the tax has been paid, in which case the amount so added shall be collected in the same manner as the tax.

SEC. 26. If any company fails to render such return within the time required, or renders any return which, in the opinion of the tax commissioner, is false or fraudulent in that it contains statements which differ from or are not as complete as statements of similar facts made to said collector of internal revenue, the tax commissioner may notify the officers of such company or any other person to appear before him with books of account containing entries relating to the business of such company, at a time and place named in such notice, to give testimony or answer interrogatories, under oath which may be administered by the tax commissioner, respecting any income liable to such tax, or the return thereof. If such company fails to make such return or to permit an examination of its books, the tax commissioner may apply to the superior court for Hartford county, or any judge thereof, for an order requiring such company to give such return, or to permit such examination.

Said court or such judge, after such notice as it may find reasonable of the pendency of such application and hearing thereon, may make such order as it finds proper, and may punish for contempt the president, vice-president, treasurer, or assistant treasurer, or in case of a corporation organized under the laws of another state, the person designated as the person upon whom service of process in civil actions may be made under the provisions of the general statutes, and may restrain such company from further prosecution of its business in this state until it has made such return, caused its officers or employees to give the information, or permitted the examination of its books, as the case may be.

SEC. 27. Any company aggrieved because of the tax laid under the provisions of part four may, within two months after the time provided for the payment of such tax, apply to the superior court for the county of Hartford for relief, and said court shall fix a time when and place where such corporation may show cause why such tax should be changed.

SEC. 28. If said court shall find such tax to be the amount authorized under the provisions of part four, it shall confirm the same, or, if not so authorized, said court shall determine the amount of such tax, and if said court shall find such company to be entitled to recover any amount, it shall order payment of such amount, with interest at the rate of six per centum per annum, and the treasurer shall pay such amount upon presentation of a certified copy of such order.

SEC. 29. The tax commissioner, his attorney, or agent, or other officer or employee of the state shall not make known in any manner the amount or source of income, profits, losses, expenditures, or any particular thereof set forth or disclosed in any income return by any such company, or permit any income return or copy thereof, or any book containing any abstract or particular thereof to be seen or examined by any person, except so far as is necessary in carrying out the provisions of this act. No person shall print or publish any income return or part thereof, or the amount or source of income, profits, losses, or expenditures appearing in any income return. Any person who shall violate any provision of this section shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

PART V.

EXAMINATIONS AND PENALTIES.

SEC. 30. The board of equalization may require from each corporation and company included in part one or two any statement or return therein provided for, under oath of the officer making such statement or return, and may require such further information as it may deem necessary. If any such corporation or company shall fail to give said board such statement, return, or information or to permit an examination of the books of such corporation or company, said board may apply to the superior court for Hartford county, or any judge thereof, for an order requiring such corporation or company to give such statement, return, or informa-

tion, or to permit such examination. Said court, after such notice to such corporation or company as it may find reasonable of the pendency of such application and hearing thereon, may make such order as it finds proper, and may punish for contempt the president and treasurer, or in case of a corporation organized under the laws of another state, the person designated as the person upon whom service of process in civil actions may be made under the provisions of the general statutes.

SEC. 31. The board of equalization may examine under oath the officers and employees of any corporation or company included in part one or two, and may examine any book of such corporation or company to verify, explain, or correct any return, and in the same manner may examine the officers, employees, and books of any such corporation or company which has not made the required statement or return. Said board may cause the attendance of any person at any examination by subpoena or capias, and may require the production of any book of any such corporation or company, and any member of said board may administer oaths. Any person who shall make any false statement or return or any false statement in any examination material to the subject of enquiry shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.

SEC. 32. The president and treasurer of any corporation or company included in part one or two which shall fail to make any annual statement within the time limited, or within ten days thereafter, shall be fined not more than five thousand nor less than five hundred dollars.

The following States now have income tax laws on file against foreign corporations:

1. Alabama,
2. Connecticut,
3. Hawaii,
4. Massachusetts,
5. Missouri,
6. Montana,
7. New York,
8. North Dakota,
9. Virginia,
10. West Virginia,
11. Wisconsin.

A digest of these laws can be found in the Corporation Manual, published by the United States Corporation Company, for 1920.

HAWAII, apparently both by its general income and its special income law amended Act 206, Laws 1919, the general law being Sections 1307 to 1316 inclusive of the Revised Laws of Hawaii, 1915, does not attempt any allocation at all, but attempts to take certain percentages of the entire net income of all corporations doing business in Hawaii.

The percentage is 2 per cent. on the general law and 2 per cent. more on the special and temporary law.

MASSACHUSETTS: The Massachusetts rule of allocation is a most complicated one. It is found in Chapter 355 of the Laws of 1919, Sections 14 *et seq.* The net income taxed is the income stated in the Federal income tax return last filed less

(a) Income from United States Government indebtedness;

(b) Dividends from Massachusetts corporations.

From such remainder, there is deducted

(a) Gains from sales of capital assets situated without the State;

(b) Interest received except from Massachusetts corporations or trust, partnership, individual, etc., having its principal place of business in Massachusetts;

(c) Dividends from non-United States corporations.

This remainder is divided into three equal parts. Of one-third, there shall be attributed to Massachusetts business such amount as shall be found by multiplying said one-third by a fraction whose numerator is the value of the corporation's tangible property situated within the State and whose denominator is the value of all the corporation's tangible property wherever situated.

The next third of the remainder is multiplied by a fraction whose numerator is the expense paid by the corporation for wages, salaries, commissions or other compensation to its employees and assigned to the corporation, as follows:

Take all the expense paid for such expenditures to its employees and deduct therefrom the com-

pensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business which are owned or rented by the corporation outside the State.

The denominator of the fraction is the amount of the company's payments to all employees.

Of the remaining third, there is attributed to the business carried on within Massachusetts such portion as shall be found by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to the State.

All such gross receipts are assignable to the State from sales except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business, which are owned or rented by the corporation outside of the State, and sales otherwise determined by the tax commissioner to be attributed to the business conducted on such premises.

Rentals or royalties from properties situated or from the use of patents within the Commonwealth.

The denominator of the fraction is the amount of the corporation's gross receipts from all its business. The total of these fractions of the net income is averaged.

As a dragnet, if a corporation maintains an office, warehouse or other place of business in a State other than Massachusetts for the purpose of reducing its tax under the Act, the tax commissioner shall, in determining the amount of its gross receipts from business assignable to the State, include therein the gross receipts from sales attributed to the corporation from business conducted at such place of business in another State.

There is further deducted from the income allocated in Massachusetts a sum equal to 5 per cent. of the dividends paid during the previous year to Massachusetts inhabitants.

The tax rate is $2\frac{1}{2}$ per cent. of such net income allocated to Massachusetts.

MISSOURI: Missouri allocates to itself, Laws 1917, page 524, as amended by Laws 1919, page 718, Section 7, only the total net income derived from intrastate business within Missouri including interest on indebtedness of Missouri residents, corporate or otherwise, and dividends on capital stock, or net earnings of Missouri corporations, joint stock companies or associations whose net income is taxable under the Act.

MONTANA: Montana allocates to itself, Chapter 79 of Laws of 1917, as amended by Chapter 69, Laws of 1919, and also by Chapter 208 of the Laws of 1919, earnings as follows:

From the gross earnings from intrastate business in Montana, there is deducted such portion thereof as the total expenses of the corporation for maintenance and operation both within and without the State of Montana are to the gross earnings of the corporation from all sources both within and without the State. There are other attempts in the Act to segregate Montana earnings from general earnings.

NEW YORK: The New York rule of allocation of net income, Chapter 726, Laws of 1917, as amended by Chapter 628, Laws of 1919, is as follows: The basis of the tax is

The net income upon which the corporation is required to pay a tax to the United States.

The proportion of the net income allocated to the State is a proportion of the aggregate of

1. The average monthly value of the real property and tangible personal property within the State.

2. The average monthly value of bills and accounts receivable for

- (a) Personal property sold by the corporation from merchandise manufactured by it within the State;

- (b) Personal property sold by the corporation from merchandise owned by it and located within the State at the time of the acceptance of the order but not manufactured by it within the State;

- (c) Services performed within the State, excluding bills and accounts receivable, arising from sales made from a stock of merchandise or other property located at a place of business maintained by the reporting corporation without the State.

3. The proportion of the average value of the stock of other corporations owned by the corporation allocated to the State but not exceeding 10 per centum of the real and tangible personal property segregated to the State.

With respect to

1. The average monthly value of all the real property and tangible personal property wherever located.

2. The average total value of bills and accounts receivable for

(a) Tangible personal property sold from merchandise manufactured by it within and without the State;

(b) Personal property sold by the corporation from merchandise owned by it at the time of acceptance of the order but not manufactured by it;

(c) Services performed both within and without the State based on orders received at offices maintained by the corporation excluding bills and accounts receivable on orders filled from a stock of merchandise or other property maintained by the corporation.

3. The average total value of stocks of other corporations owned by the corporation but not exceeding 10 per centum of the aggregate real and tangible personal property reported.

The rate is $4\frac{1}{2}$ per cent., with a minimum tax of \$10, Chapter 628, Laws of 1919.

NORTH DAKOTA: The scheme of the North Dakota allocation is that proportion of the net earnings which the business within the State bears to the entire business within or without the State. Business within the State is held to mean such proportion of the total business within and without

the State as the property of such taxpayer within the State bears to its entire property engaged in business within and without the State.

The tax is a sliding scale.

On income classified as unearned and earned, running from $\frac{1}{2}$ of 1 per cent. to 6 per cent. on unearned income and from $\frac{1}{4}$ of 1 per cent. to 10 per cent. on so-called earned income.

VIRGINIA: The Virginia rule of allocation of net income (Chapter 43, Acts Extra Session 1919) provides that when the corporation's books do not show specifically income realized from transactions or property located within the State, such income shall be apportioned to the State, as follows:

The gross business in dollars of the corporation in the State, including the business of production measured by its cost and the business of distribution of sales measured by the value of gross sales, less cost of production, for the year ending December 31st, is added to the book value of the gross assets on January 1st of the year, for which return is being made, employed in business within the State. The sum so obtained is the numerator of a fraction of which the denominator is the total gross business, as above defined, of the corporation both within and without the State, added to the total book value of the gross book assets on said January 1st, wherever employed in business. A proportion of the entire gross income of such corporation, represented by such fraction, is the gross income of such corporation returnable for taxation in the State.

Certain deductions follow in the statute, and they are substantially the deductions provided by the Federal Income Tax Law, but such deductions must be payments actually made within the State.

Income is 1 per cent. of the taxable income up to \$3,000, and 2 per cent. in excess of \$3,000.

WEST VIRGINIA: The West Virginia rule of allocation of net income (Section 1279a, West Virginia Code Supplement of 1918, as amended by Chapter 7, Extra Session Laws of 1919) is as follows:

The proportion allocated to the State is that portion of the entire net income which bears the same proportion to the whole net income that the assessed value for purposes of taxation of its property within the State bears to the total assessed value of all its assets and property within jurisdictions where the same are located.

The rate is $\frac{1}{4}$ of 1 per cent.

Note: This is an extraordinary rule because several States, such as Wisconsin, have given up taxes on property in whole or in part, and substituted therefor income taxes. It assumes that the West Virginia scheme of property taxation is in force in every State.

WISCONSIN: The Wisconsin rule of allocation of net income (Chapter 658, Laws of 1911, as amended, the last amendment being Chapter 345 of the Laws of 1919) provided that the allocation and separate accounting should be made in manner and

form prescribed by the tax commission, otherwise as specified in Subsection e of Subsection 7 of Section 1770b of the statutes, Revision 1919, so far as applicable (Laws 1913, Chapter 720).

This subdivision provided for the determination of authorized capital stock employed in a State. It is computed by taking the gross of the business in dollars of a corporation in the State and adding the same to the full value in dollars of the property of the corporation located in the State. The sum so obtained is the numerator of a fraction of which the denominator consists of the total gross business in dollars of the corporation both within and without the State, added to the full value in dollars of the entire property of the corporation both within and without the State.

The rate is from 2 per cent. on the first \$1,000 of taxable income to 6 per cent. on all taxable income in excess of \$7,000. The law, however, relieves the corporation from paying certain property taxes in a State and for the benefit not only of the State but political subdivisions therein which it attempts to proportion.

OBSERVATIONS :

The Connecticut law is, as we have said, limited to tangibles.

The Massachusetts law attempts to strike an average between tangibles, gross expenses and gross sales, also entirely eliminating intangibles and furthermore, very cleverly, to use no stronger word, puts the burden on the taxpayer to show that a non-State corporation's sales or expenses are not attributable to Massachusetts by expressly providing that to be exempt they must all arise or be in-

curred from an agent or agencies permanently or temporarily located at owned or rented offices of the corporation outside the State. One wonders to what jurisdiction would be allocated payments to a lawyer, an architect, an engineer, a broker, etc., and to what would be allocated receipts from sales made by brokers, general sales agencies, factors *del credere*, etc.

New York attempts to take advantage of receivables within the State as it is a commercial State, but at the same time eliminates, except to the extent of 10 per cent., all investments.

In brief, if one should assume that a corporation is doing the same identical business in each and all of the above-named States, having tangible property located therein, and yet being foreign to them all—say a Delaware corporation—the resultant taxation in each State and in all States would be startling. If one should assume that a corporation is doing a general business in each and all of the above-named States, and yet being a corporation foreign to them all, the aggregate taxation might conceivably be in excess of 100 per cent. of the corporation's total net income.

The Columbia Law Review, Volume 2, pages 324 and 327, thus observed concerning the decision of the State Court in this case:

"Cases * * * have not squarely faced the fact that manufacturing, selling, billing, collecting and advertising all contribute to the income derived from the sale of any commodity. Just how much each contributes is no easy matter to decide. *The Connecticut statute plainly avoids the whole question.*"

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Supreme Court of the United States

OCTOBER TERM, 1920

No. 215

THE UNDERWOOD TYREWEELTHER
COMPANY

Plaintiff in Error

vs.

FREDERICK S. CHAMBERLAIN
Treasurer of the State of Connecticut

Defendant in Error

IN ERROR TO THE SUPERIOR COURT
FOR HARTFORD COUNTY,
CONNECTICUT

Brief and Argument for Defendant in Error

FRANK H. HARRIS, Attorney General,
JAMES M. CHAPMAN, and
EDWIN M. ALDRICH,
of Connecticut.

THE CASE OF THE UNDERWOOD TYREWEELTHER
COMPANY, Plaintiff in Error, vs. FREDERICK S.
CHAMBERLAIN, Defendant in Error.

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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 215

THE UNDERWOOD TYPEWRITER
COMPANY,

Plaintiff in Error.

vs.

FREDERICK S. CHAMBERLAIN,
TREASURER OF THE STATE OF CONNECTICUT,

Defendant in Error.

IN ERROR TO THE SUPERIOR COURT
FOR HARTFORD COUNTY,
CONNECTICUT

Brief and Argument for Defendant in Error.

STATEMENT.

This is a writ of error from a final judgment of the Superior Court for Hartford County, Connecticut, rendered in favor the Treasurer of the State of Connecticut, in an action brought by complaint dated September 26, 1916, under Sections 27 and 28 of Connecti-

cut's Miscellaneous Corporations Tax Law. The suit is in the nature of an appeal from the action of the Tax Commissioner of Connecticut in assessing a corporation net income tax against the plaintiff in error, the Underwood Typewriter Company, a Delaware corporation engaged in the business of manufacturing typewriters in Hartford, Connecticut.

The Miscellaneous Corporation Tax Law under which this tax was laid, in Sections 27 and 28, provides as a remedy to an aggrieved tax payer the right to apply to the Superior Court for Hartford County for relief by an application in the nature of an appeal for the correction of the tax, and this was, and is, the remedy now sought by this plaintiff.

The validity of the remedy was attacked by the State of Connecticut, defendant in error, by demurrer to the prayers for relief in the plaintiff's application. The state in said demurrer claimed that the remedy provided by Sections 27 and 28 of the Statute was limited to a review of the mathematical computation forming the basis of the assessment; but the Supreme Court of Errors of Connecticut (Record Pages 13 to 18), held that the remedy provided by the Statute was not so limited, and was broad enough to afford the plaintiff a complete remedy on all constitutional questions, and for a correction of the tax if unjust or illegal.

This case was then remanded to the Superior Court for Hartford County for further proceedings, and by that court was reserved upon an agreed statement of facts for the advice of the Supreme Court of Errors of the state upon certain constitutional questions appearing in the record, pages 43 and 44. Briefly, these questions are (1) Does the statute infringe the commerce clause of the Federal Constitution and the Fourteenth Amendment, and (2) Does that portion of the statute providing for a disclosure of the Federal Income Tax report violate Section 2 of Article 4 of the Federal Constitution, and contravene the 4th, 5th and 14th Amendments.

The Supreme Court of Errors of Connecticut thereupon advised the Superior Court (record page 53), that all of the questions should be answered in the negative. Upon this advice, the Superior Court for Hartford County (record pages 54 and 55), rendered final judgment for the defendant, the Treasurer of the State of Connecticut; and from this final judgment the present writ of error is brought.

The errors here assigned claim the invalidity of the tax upon the grounds of the commerce clause and the Fourteenth Amendment abne.

SUMMARY OF DEFENDANT'S ARGUMENT.

1. The plaintiff has failed upon this record to lay a basis of fact that its property and income beyond the authority of Connecticut is taxed. On the contrary, the facts produced in the record point to the reasonableness and justice of the tax.

2. Having failed upon this record to produce facts from which it can be claimed that the results produced by the tax are unreasonable, and that the assessment should be corrected, the plaintiff, to succeed in destroying this lay, is bound to convince this court that the Connecticut tax is inherently and intrinsically bad upon any state of facts, regardless of the results in this particular case.

3. The Connecticut tax is based upon a proper subject matter, namely, the business protected by Connecticut, as measured by the net income apportioned to the state.

4. The Connecticut rule for attributing a portion of this net income to the state is not based upon irrelevant or inadequate data, nor does it produce results wholly unreasonable; but, on the contrary measures the subject matter with reference to tangible properties, the principal source of the plaintiff's income and profits; and, as a result, exempts 53% of this plaintiff's net income, and bases its tax upon 47% only.

5. The elements collected under the term "tangible property" applied to a corporation which admits in its sworn return to the state authorities that it derives its profits principally from dealings in tangible property is a proper method of apportionment.

6. As construed by the state court, the intent and effect of the rule of apportionment is to exclude entirely from consideration purely extra-state income, or any subject matter not attributable to Connecticut for purposes of taxation, and it is not the intent or effect of this law to tax a portion of each and every item of the plaintiff's income.

7. The plaintiff's claim that the intangible property or business done in the state should be used in the measure of apportionment is no more than an expression of dissent from the opinion of the Legislature as to the fairest method of apportionment to be adopted, but it is the law that the legislative discretion must be given due weight, and the function of the Court is to discover whether or not that discretion has been illegally exercised.

"The legislature is, in the first instance, the judge of what is necessary for the public welfare and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Erie Railroad v. Williams, 233 U. S., 685.

8. If these elements, namely, intangible property or business done, were added to the measure in the Connecticut Rule of Apportionment, there would, indeed, have been a more complicated rule, difficult of application, but the practical results would not have been more favorable to the plaintiff.

9. The plaintiff cannot well claim that its net income arising from sources in Connecticut should be found by a mathematical accounting only, and that no apportionment rule would be valid. Its own failure in this case to apportion its income by a process of mathematics is evidence of the difficulty which is involved in such a method. Moreover this court has many times approved methods of allocation or apportionment when deemed reasonable.

10. If in any particular case the application of the Connecticut rule results in an unjust or illegal tax, or if in this case the plaintiff had, upon proven facts, shown that its tax was unjust or illegal, the Connecticut statute itself provides a remedy for the correction of the tax, and the assessment and levy of a just and legal tax by a special tribunal constituted by the act itself, namely, the Superior Court for Hartford County. Under the construction placed upon the act by the Supreme Court of the State, the Superior Court for Hartford County has authority to hear any evidence which tends to show that the Connecticut rule

of apportionment works any injustice in any given case and to correct the tax or to lay a new tax entirely as the circumstances may require.

ARGUMENT.

I.

The case of the plaintiff rests upon the facts contained in this record and not upon some other state of facts.

The brief and argument of the Plaintiff in error seems to be particularly concerned with fears of future injustice rather than proof of present injury.

The gist of the contention is that other states and other laws may superimpose burdens upon those borne by this plaintiff under the Connecticut law until the plaintiff's income will be twice or thrice taxed or dissipated entirely.

So far as relates to the Connecticut law itself the complaint is that upon another state of facts Connecticut's taxation may burden the plaintiff's property or income beyond its borders.

So we are cast upon the uncharted sea of hypothetical instances and suppositious cases far from the moorings of the present record.

We respectfully submit that the facts disclosed in this record and the writ of complaint

which instituted this action, and the assignments of error to this court, are not to be treated as a mere preface to a treatise on what might happen "if," "suppose" or "should;" but the facts disclosed in this record are the very thing now under discussion.

The writ of complaint by which this action was brought on September 26th, 1916, made certain broad assertions, namely that the plaintiff is chiefly engaged in the state of Connecticut in interstate commerce; that by far the larger part of the capital, property, and assets of the plaintiff are permanently invested and located beyond the limits of the state of Connecticut; that the greater portion of the income apportioned under the law to Connecticut was actually earned and received by the plaintiff without the state of Connecticut; and that, as a matter of fact, not over \$40,-160.27 was earned or received in domestic business carried on by the applicant in Connecticut.

The proof of these assertions was essential to the plaintiff's case. The facts alleged should have been proved. But the only facts before this court are contained in an agreed statement of facts prepared by the plaintiff and assented to by the defendant, and they fall far short of proof of the assertions made. It is upon the facts contained in this record that the case must be decided.

Courts deal with things as they are.
“Every case involving the validity of a tax must be decided upon its own facts.”

Baltic Mining Co. v. Mass., 231 U. S., 68, page 85.

This court said in *Adams Express Co. v. Ohio*, 166 U. S., 185, at page 222:

“It is suggested that the company may have bonds, stocks or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities.”

We therefore briefly state the facts presented by the record calling particular attention to certain features therein disclosed.

II.

There is no analysis in this record of the plaintiff's net income attributable to its operations in Connecticut as distinguished from its operations outside of Connecticut

The majority of the State Court remarks (record page 52) “On this record the amount of the plaintiff's net profit attributable to its operations in Connecticut cannot be ascertained.”

Again (record page 51).

“ Upon this record the plaintiff has made no attempt to shoulder such a burden and if it had been possible, by expert evidence or otherwise, to lay any basis of evidence for such a claim, we should suppose that the plaintiff would have, at least attempted to do so.”

And the one dissenting judge remarks (record page 61).

“ As to the balance, we do not know the exact net profit earned here and elsewhere.”

It is true that the plaintiff states (record page 23) the amount of net profits from sales and rentals in Connecticut as distinguished from the net profits from its total sales, but the only attempt to analyze, even remotely, the source of the plaintiff's net income appears in the agreed finding of facts (record pages 23 to 25), where an attempt is made to distribute territorially gross receipts from company's business, and, also, to distribute territorially an item called “ gross profits.” The item of gross profits is explained in the record, page 25, as follows:

“ The term ‘ gross profit ’ as used in this paragraph means the difference between receipts and manufacturing costs. General administrative expense, including salaries of officers, sales expense, and other like charges, *wherever incurred,*

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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 215

THE UNDERWOOD TYPEWRITER
COMPANY,

Plaintiff in Error.

vs.

FREDERICK S. CHAMBERLAIN,
TREASURER OF THE STATE OF CONNECTICUT,

Defendant in Error.

IN ERROR TO THE SUPERIOR COURT
FOR HARTFORD COUNTY,
CONNECTICUT

Brief and Argument for Defendant in Error.

STATEMENT.

This is a writ of error from a final judgment of the Superior Court for Hartford County, Connecticut, rendered in favor the Treasurer of the State of Connecticut, in an action brought by complaint dated September 26, 1916, under Sections 27 and 28 of Connecti-

cut's Miscellaneous Corporations Tax Law. The suit is in the nature of an appeal from the action of the Tax Commissioner of Connecticut in assessing a corporation net income tax against the plaintiff in error, the Underwood Typewriter Company, a Delaware corporation engaged in the business of manufacturing typewriters in Hartford, Connecticut.

The Miscellaneous Corporation Tax Law under which this tax was laid, in Sections 27 and 28, provides as a remedy to an aggrieved tax payer the right to apply to the Superior Court for Hartford County for relief by an application in the nature of an appeal for the correction of the tax, and this was, and is, the remedy now sought by this plaintiff.

The validity of the remedy was attacked by the State of Connecticut, defendant in error, by demurrer to the prayers for relief in the plaintiff's application. The state in said demurrer claimed that the remedy provided by Sections 27 and 28 of the Statute was limited to a review of the mathematical computation forming the basis of the assessment; but the Supreme Court of Errors of Connecticut (Record Pages 13 to 18), held that the remedy provided by the Statute was not so limited, and was broad enough to afford the plaintiff a complete remedy on all constitutional questions, and for a correction of the tax if unjust or illegal.

This case was then remanded to the Superior Court for Hartford County for further proceedings, and by that court was reserved upon an agreed statement of facts for the advice of the Supreme Court of Errors of the state upon certain constitutional questions, appearing in the record, pages 43 and 44. Briefly, these questions are (1) Does the statute infringe the commerce clause of the Federal Constitution and the Fourteenth Amendment, and (2) Does that portion of the statute providing for a disclosure of the Federal Income Tax report violate Section 2 of Article 4 of the Federal Constitution, and contravene the 4th, 5th and 14th Amendments.

The Supreme Court of Errors of Connecticut thereupon advised the Superior Court (record page 53), that all of the questions should be answered in the negative. Upon this advice, the Superior Court for Hartford County (record pages 54 and 55), rendered final judgment for the defendant, the Treasurer of the State of Connecticut; and from this final judgment the present writ of error is brought.

The errors here assigned claim the invalidity of the tax upon the grounds of the commerce clause and the Fourteenth Amendment alone.

SUMMARY OF DEFENDANT'S ARGUMENT.

1. The plaintiff has failed upon this record to lay a basis of fact that its property and income beyond the authority of Connecticut is taxed. On the contrary, the facts produced in the record point to the reasonableness and justice of the tax.

2. Having failed upon this record to produce facts from which it can be claimed that the results produced by the tax are unreasonable, and that the assessment should be corrected, the plaintiff, to succeed in destroying this lay, is bound to convince this court that the Connecticut tax is inherently and intrinsically bad upon any state of facts, regardless of the results in this particular case.

3. The Connecticut tax is based upon a proper subject matter, namely, the business protected by Connecticut, as measured by the net income apportioned to the state.

4. The Connecticut rule for attributing a portion of this net income to the state is not based upon irrelevant or inadequate data, nor does it produce results wholly unreasonable; but, on the contrary measures the subject matter with reference to tangible properties, the principal source of the plaintiff's income and profits; and, as a result, exempts 53% of this plaintiff's net income, and bases its tax upon 47% only.

5. The elements collected under the term "tangible property" applied to a corporation which admits in its sworn return to the state authorities that it derives its profits principally from dealings in tangible property is a proper method of apportionment.

6. As construed by the state court, the intent and effect of the rule of apportionment is to exclude entirely from consideration purely extra-state income, or any subject matter not attributable to Connecticut for purposes of taxation, and it is not the intent or effect of this law to tax a portion of each and every item of the plaintiff's income.

7. The plaintiff's claim that the intangible property or business done in the state should be used in the measure of apportionment is no more than an expression of dissent from the opinion of the Legislature as to the fairest method of apportionment to be adopted, but it is the law that the legislative discretion must be given due weight, and the function of the Court is to discover whether or not that discretion has been illegally exercised.

"The legislature is, in the first instance, the judge of what is necessary for the public welfare and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Erie Railroad v. Williams, 233 U. S., 685.

8. If these elements, namely, intangible property or business done, were added to the measure in the Connecticut Rule of Apportionment, there would, indeed, have been a more complicated rule, difficult of application, but the practical results would not have been more favorable to the plaintiff.

9. The plaintiff cannot well claim that its net income arising from sources in Connecticut should be found by a mathematical accounting only, and that no apportionment rule would be valid. Its own failure in this case to apportion its income by a process of mathematics is evidence of the difficulty which is involved in such a method. Moreover this court has many times approved methods of allocation or apportionment when deemed reasonable.

10. If in any particular case the application of the Connecticut rule results in an unjust or illegal tax, or if in this case the plaintiff had, upon proven facts, shown that its tax was unjust or illegal, the Connecticut statute itself provides a remedy for the correction of the tax, and the assessment and levy of a just and legal tax by a special tribunal constituted by the act itself, namely, the Superior Court for Hartford County. Under the construction placed upon the act by the Supreme Court of the State, the Superior Court for Hartford County has authority to hear any evidence which tends to show that the Connecticut rule

of apportionment works any injustice in any given case and to correct the tax or to lay a new tax entirely as the circumstances may require.

ARGUMENT.

I.

The case of the plaintiff rests upon the facts contained in this record and not upon some other state of facts.

The brief and argument of the Plaintiff in error seems to be particularly concerned with fears of future injustice rather than proof of present injury.

The gist of the contention is that other states and other laws may superimpose burdens upon those borne by this plaintiff under the Connecticut law until the plaintiff's income will be twice or thrice taxed or dissipated entirely.

So far as relates to the Connecticut law itself the complaint is that upon another state of facts Connecticut's taxation may burden the plaintiff's property or income beyond its borders.

So we are cast upon the uncharted sea of hypothetical instances and suppositious cases far from the moorings of the present record.

We respectfully submit that the facts disclosed in this record and the writ of complaint

which instituted this action, and the assignments of error to this court, are not to be treated as a mere preface to a treatise on what might happen "if," "suppose" or "should;" but the facts disclosed in this record are the very thing now under discussion.

The writ of complaint by which this action was brought on September 26th, 1916, made certain broad assertions, namely that the plaintiff is chiefly engaged in the state of Connecticut in interstate commerce; that by far the larger part of the capital, property, and assets of the plaintiff are permanently invested and located beyond the limits of the state of Connecticut; that the greater portion of the income apportioned under the law to Connecticut was actually earned and received by the plaintiff without the state of Connecticut; and that, as a matter of fact, not over \$40,-160.27 was earned or received in domestic business carried on by the applicant in Connecticut.

The proof of these assertions was essential to the plaintiff's case. The facts alleged should have been proved. But the only facts before this court are contained in an agreed statement of facts prepared by the plaintiff and assented to by the defendant, and they fall far short of proof of the assertions made. It is upon the facts contained in this record that the case must be decided.

Courts deal with things as they are. "Every case involving the validity of a tax must be decided upon its own facts."

Baltic Mining Co. v. Mass., 231 U. S., 68, page 85.

This court said in *Adams Express Co. v. Ohio*, 166 U. S., 185, at page 222:

"It is suggested that the company may have bonds, stocks or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities."

We therefore briefly state the facts presented by the record calling particular attention to certain features therein disclosed.

II.

There is no analysis in this record of the plaintiff's net income attributable to its operations in Connecticut as distinguished from its operations outside of Connecticut

The majority of the State Court remarks (record page 52) "On this record the amount of the plaintiff's net profit attributable to its operations in Connecticut cannot be ascertained."

Again (record page 51).

“Upon this record the plaintiff has made no attempt to shoulder such a burden and if it had been possible, by expert evidence or otherwise, to lay any basis of evidence for such a claim, we should suppose that the plaintiff would have, at least attempted to do so.”

And the one dissenting judge remarks (record page 61).

“As to the balance, we do not know the exact net profit earned here and elsewhere.”

It is true that the plaintiff states (record page 23) the amount of net profits from sales and rentals in Connecticut as distinguished from the net profits from its total sales, but the only attempt to analyze, even remotely, the source of the plaintiff's net income appears in the agreed finding of facts (record pages 23 to 25), where an attempt is made to distribute territorially gross receipts from company's business, and, also, to distribute territorially an item called “gross profits.” The item of gross profits is explained in the record, page 25, as follows:

“The term ‘gross profit’ as used in this paragraph means the difference between receipts and manufacturing costs. General administrative expense, including salaries of officers, sales expense, and other like charges, *wherever incurred*,

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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 215

THE UNDERWOOD TYPEWRITER
COMPANY,

Plaintiff in Error.

vs.

FREDERICK S. CHAMBERLAIN,
TREASURER OF THE STATE OF CONNECTICUT,

Defendant in Error.

IN ERROR TO THE SUPERIOR COURT
FOR HARTFORD COUNTY,
CONNECTICUT

Brief and Argument for Defendant in Error.

STATEMENT.

This is a writ of error from a final judgment of the Superior Court for Hartford County, Connecticut, rendered in favor the Treasurer of the State of Connecticut, in an action brought by complaint dated September 26, 1916, under Sections 27 and 28 of Connecti-

cut's Miscellaneous Corporations Tax Law. The suit is in the nature of an appeal from the action of the Tax Commissioner of Connecticut in assessing a corporation net income tax against the plaintiff in error, the Underwood Typewriter Company, a Delaware corporation engaged in the business of manufacturing typewriters in Hartford, Connecticut.

The Miscellaneous Corporation Tax Law under which this tax was laid, in Sections 27 and 28, provides as a remedy to an aggrieved tax payer the right to apply to the Superior Court for Hartford County for relief by an application in the nature of an appeal for the correction of the tax, and this was, and is, the remedy now sought by this plaintiff.

The validity of the remedy was attacked by the State of Connecticut, defendant in error, by demurrer to the prayers for relief in the plaintiff's application. The state in said demurrer claimed that the remedy provided by Sections 27 and 28 of the Statute was limited to a review of the mathematical computation forming the basis of the assessment; but the Supreme Court of Errors of Connecticut (Record Pages 13 to 18), held that the remedy provided by the Statute was not so limited, and was broad enough to afford the plaintiff a complete remedy on all constitutional questions, and for a correction of the tax if unjust or illegal.

This case was then remanded to the Superior Court for Hartford County for further proceedings, and by that court was reserved upon an agreed statement of facts for the advice of the Supreme Court of Errors of the state upon certain constitutional questions appearing in the record, pages 43 and 44. Briefly, these questions are (1) Does the statute infringe the commerce clause of the Federal Constitution and the Fourteenth Amendment, and (2) Does that portion of the statute providing for a disclosure of the Federal Income Tax report violate Section 2 of Article 4 of the Federal Constitution, and contravene the 4th, 5th and 14th Amendments.

The Supreme Court of Errors of Connecticut thereupon advised the Superior Court (record page 53), that all of the questions should be answered in the negative. Upon this advice, the Superior Court for Hartford County (record pages 54 and 55), rendered final judgment for the defendant, the Treasurer of the State of Connecticut; and from this final judgment the present writ of error is brought.

The errors here assigned claim the invalidity of the tax upon the grounds of the commerce clause and the Fourteenth Amendment alone.

SUMMARY OF DEFENDANT'S ARGUMENT.

1. The plaintiff has failed upon this record to lay a basis of fact that its property and income beyond the authority of Connecticut is taxed. On the contrary, the facts produced in the record point to the reasonableness and justice of the tax.

2. Having failed upon this record to produce facts from which it can be claimed that the results produced by the tax are unreasonable, and that the assessment should be corrected, the plaintiff, to succeed in destroying this lay, is bound to convince this court that the Connecticut tax is inherently and intrinsically bad upon any state of facts, regardless of the results in this particular case.

3. The Connecticut tax is based upon a proper subject matter, namely, the business protected by Connecticut, as measured by the net income apportioned to the state.

4. The Connecticut rule for attributing a portion of this net income to the state is not based upon irrelevant or inadequate data, nor does it produce results wholly unreasonable; but, on the contrary measures the subject matter with reference to tangible properties, the principal source of the plaintiff's income and profits; and, as a result, exempts 53% of this plaintiff's net income, and bases its tax upon 47% only.

5. The elements collected under the term "tangible property" applied to a corporation which admits in its sworn return to the state authorities that it derives its profits principally from dealings in tangible property is a proper method of apportionment.

6. As construed by the state court, the intent and effect of the rule of apportionment is to exclude entirely from consideration purely extra-state income, or any subject matter not attributable to Connecticut for purposes of taxation, and it is not the intent or effect of this law to tax a portion of each and every item of the plaintiff's income.

7. The plaintiff's claim that the intangible property or business done in the state should be used in the measure of apportionment is no more than an expression of dissent from the opinion of the Legislature as to the fairest method of apportionment to be adopted, but it is the law that the legislative discretion must be given due weight, and the function of the Court is to discover whether or not that discretion has been illegally exercised.

"The legislature is, in the first instance, the judge of what is necessary for the public welfare and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Erie Railroad v. Williams, 233 U. S., 685.

8. If these elements, namely, intangible property or business done, were added to the measure in the Connecticut Rule of Apportionment, there would, indeed, have been a more complicated rule, difficult of application, but the practical results would not have been more favorable to the plaintiff.

9. The plaintiff cannot well claim that its net income arising from sources in Connecticut should be found by a mathematical accounting only, and that no apportionment rule would be valid. Its own failure in this case to apportion its income by a process of mathematics is evidence of the difficulty which is involved in such a method. Moreover this court has many times approved methods of allocation or apportionment when deemed reasonable.

10. If in any particular case the application of the Connecticut rule results in an unjust or illegal tax, or if in this case the plaintiff had, upon proven facts, shown that its tax was unjust or illegal, the Connecticut statute itself provides a remedy for the correction of the tax, and the assessment and levy of a just and legal tax by a special tribunal constituted by the act itself, namely, the Superior Court for Hartford County. Under the construction placed upon the act by the Supreme Court of the State, the Superior Court for Hartford County has authority to hear any evidence which tends to show that the Connecticut rule

of apportionment works any injustice in any given case and to correct the tax or to lay a new tax entirely as the circumstances may require.

ARGUMENT.

I.

The case of the plaintiff rests upon the facts contained in this record and not upon some other state of facts.

The brief and argument of the Plaintiff in error seems to be particularly concerned with fears of future injustice rather than proof of present injury.

The gist of the contention is that other states and other laws may superimpose burdens upon those borne by this plaintiff under the Connecticut law until the plaintiff's income will be twice or thrice taxed or dissipated entirely.

So far as relates to the Connecticut law itself the complaint is that upon another state of facts Connecticut's taxation may burden the plaintiff's property or income beyond its borders.

So we are cast upon the uncharted sea of hypothetical instances and suppositious cases far from the moorings of the present record.

We respectfully submit that the facts disclosed in this record and the writ of complaint

which instituted this action, and the assignments of error to this court, are not to be treated as a mere preface to a treatise on what might happen "if," "suppose" or "should;" but the facts disclosed in this record are the very thing now under discussion.

The writ of complaint by which this action was brought on September 26th, 1916, made certain broad assertions, namely that the plaintiff is chiefly engaged in the state of Connecticut in interstate commerce; that by far the larger part of the capital, property, and assets of the plaintiff are permanently invested and located beyond the limits of the state of Connecticut; that the greater portion of the income apportioned under the law to Connecticut was actually earned and received by the plaintiff without the state of Connecticut; and that, as a matter of fact, not over \$40,-160.27 was earned or received in domestic business carried on by the applicant in Connecticut.

The proof of these assertions was essential to the plaintiff's case. The facts alleged should have been proved. But the only facts before this court are contained in an agreed statement of facts prepared by the plaintiff and assented to by the defendant, and they fall far short of proof of the assertions made. It is upon the facts contained in this record that the case must be decided.

Courts deal with things as they are.
“Every case involving the validity of a tax must be decided upon its own facts.”

Baltic Mining Co. v. Mass., 231 U. S., 68, page 85.

This court said in *Adams Express Co. v. Ohio*, 166 U. S., 185, at page 222:

“It is suggested that the company may have bonds, stocks or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities.”

We therefore briefly state the facts presented by the record calling particular attention to certain features therein disclosed.

II.

There is no analysis in this record of the plaintiff's net income attributable to its operations in Connecticut as distinguished from its operations outside of Connecticut

The majority of the State Court remarks (record page 52) “On this record the amount of the plaintiff's net profit attributable to its operations in Connecticut cannot be ascertained.”

Again (record page 51).

“ Upon this record the plaintiff has made no attempt to shoulder such a burden and if it had been possible, by expert evidence or otherwise, to lay any basis of evidence for such a claim, we should suppose that the plaintiff would have, at least attempted to do so.”

And the one dissenting judge remarks (record page 61).

“ As to the balance, we do not know the exact net profit earned here and elsewhere.”

It is true that the plaintiff states (record page 23) the amount of net profits from sales and rentals in Connecticut as distinguished from the net profits from its total sales, but the only attempt to analyze, even remotely, the source of the plaintiff's net income appears in the agreed finding of facts (record pages 23 to 25), where an attempt is made to distribute territorially gross receipts from company's business, and, also, to distribute territorially an item called “ gross profits.” The item of gross profits is explained in the record, page 25, as follows:

“ The term ‘ gross profit ’ as used in this paragraph means the difference between receipts and manufacturing costs. General administrative expense, including salaries of officers, sales expense, and other like charges, *wherever incurred*,

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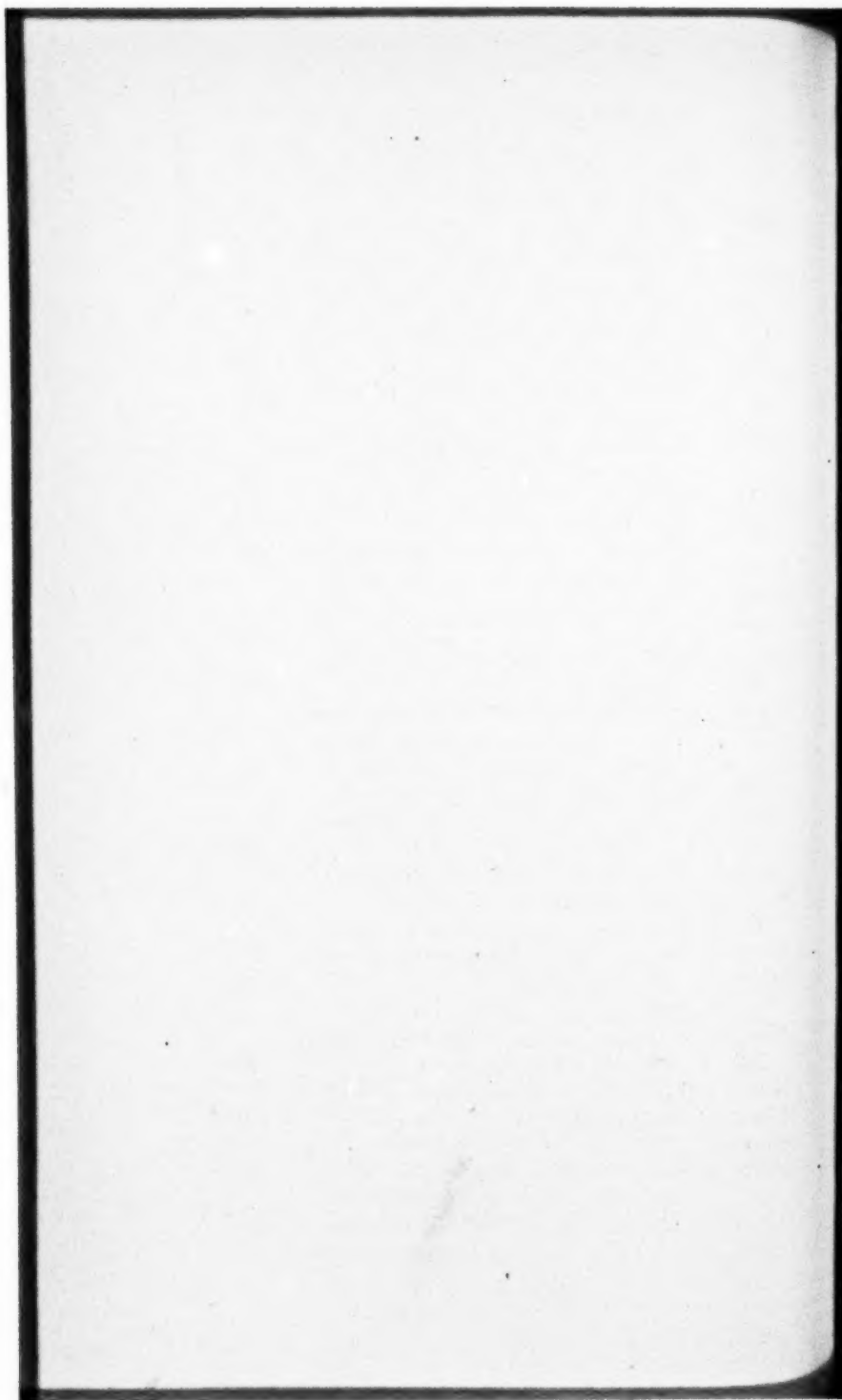
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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 215

THE UNDERWOOD TYPEWRITER
COMPANY,

Plaintiff in Error.

vs.

FREDERICK S. CHAMBERLAIN,
TREASURER OF THE STATE OF CONNECTICUT,

Defendant in Error.

IN ERROR TO THE SUPERIOR COURT
FOR HARTFORD COUNTY,
CONNECTICUT

Brief and Argument for Defendant in Error.

STATEMENT.

This is a writ of error from a final judgment of the Superior Court for Hartford County, Connecticut, rendered in favor the Treasurer of the State of Connecticut, in an action brought by complaint dated September 26, 1916, under Sections 27 and 28 of Connecti-

cut's Miscellaneous Corporations Tax Law. The suit is in the nature of an appeal from the action of the Tax Commissioner of Connecticut in assessing a corporation net income tax against the plaintiff in error, the Underwood Typewriter Company, a Delaware corporation engaged in the business of manufacturing typewriters in Hartford, Connecticut.

The Miscellaneous Corporation Tax Law under which this tax was laid, in Sections 27 and 28, provides as a remedy to an aggrieved tax payer the right to apply to the Superior Court for Hartford County for relief by an application in the nature of an appeal for the correction of the tax, and this was, and is, the remedy now sought by this plaintiff.

The validity of the remedy was attacked by the State of Connecticut, defendant in error, by demurrer to the prayers for relief in the plaintiff's application. The state in said demurrer claimed that the remedy provided by Sections 27 and 28 of the Statute was limited to a review of the mathematical computation forming the basis of the assessment; but the Supreme Court of Errors of Connecticut (Record Pages 13 to 18), held that the remedy provided by the Statute was not so limited, and was broad enough to afford the plaintiff a complete remedy on all constitutional questions, and for a correction of the tax if unjust or illegal.

This case was then remanded to the Superior Court for Hartford County for further proceedings, and by that court was reserved upon an agreed statement of facts for the advice of the Supreme Court of Errors of the state upon certain constitutional questions appearing in the record, pages 43 and 44. Briefly, these questions are (1) Does the statute infringe the commerce clause of the Federal Constitution and the Fourteenth Amendment, and (2) Does that portion of the statute providing for a disclosure of the Federal Income Tax report violate Section 2 of Article 4 of the Federal Constitution, and contravene the 4th, 5th and 14th Amendments.

The Supreme Court of Errors of Connecticut thereupon advised the Superior Court (record page 53), that all of the questions should be answered in the negative. Upon this advice, the Superior Court for Hartford County (record pages 54 and 55), rendered final judgment for the defendant, the Treasurer of the State of Connecticut; and from this final judgment the present writ of error is brought.

The errors here assigned claim the invalidity of the tax upon the grounds of the commerce clause and the Fourteenth Amendment alone.

SUMMARY OF DEFENDANT'S ARGUMENT.

1. The plaintiff has failed upon this record to lay a basis of fact that its property and income beyond the authority of Connecticut is taxed. On the contrary, the facts produced in the record point to the reasonableness and justice of the tax.

2. Having failed upon this record to produce facts from which it can be claimed that the results produced by the tax are unreasonable, and that the assessment should be corrected, the plaintiff, to succeed in destroying this lay, is bound to convince this court that the Connecticut tax is inherently and intrinsically bad upon any state of facts, regardless of the results in this particular case.

3. The Connecticut tax is based upon a proper subject matter, namely, the business protected by Connecticut, as measured by the net income apportioned to the state.

4. The Connecticut rule for attributing a portion of this net income to the state is not based upon irrelevant or inadequate data, nor does it produce results wholly unreasonable; but, on the contrary measures the subject matter with reference to tangible properties, the principal source of the plaintiff's income and profits; and, as a result, exempts 53% of this plaintiff's net income, and bases its tax upon 47% only.

5. The elements collected under the term "tangible property" applied to a corporation which admits in its sworn return to the state authorities that it derives its profits principally from dealings in tangible property is a proper method of apportionment.

6. As construed by the state court, the intent and effect of the rule of apportionment is to exclude entirely from consideration purely extra-state income, or any subject matter not attributable to Connecticut for purposes of taxation, and it is not the intent or effect of this law to tax a portion of each and every item of the plaintiff's income.

7. The plaintiff's claim that the intangible property or business done in the state should be used in the measure of apportionment is no more than an expression of dissent from the opinion of the Legislature as to the fairest method of apportionment to be adopted, but it is the law that the legislative discretion must be given due weight, and the function of the Court is to discover whether or not that discretion has been illegally exercised.

"The legislature is, in the first instance, the judge of what is necessary for the public welfare and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

Erie Railroad v. Williams, 233 U. S., 685.

8. If these elements, namely, intangible property or business done, were added to the measure in the Connecticut Rule of Apportionment, there would, indeed, have been a more complicated rule, difficult of application, but the practical results would not have been more favorable to the plaintiff.

9. The plaintiff cannot well claim that its net income arising from sources in Connecticut should be found by a mathematical accounting only, and that no apportionment rule would be valid. Its own failure in this case to apportion its income by a process of mathematics is evidence of the difficulty which is involved in such a method. Moreover this court has many times approved methods of allocation or apportionment when deemed reasonable.

10. If in any particular case the application of the Connecticut rule results in an unjust or illegal tax, or if in this case the plaintiff had, upon proven facts, shown that its tax was unjust or illegal, the Connecticut statute itself provides a remedy for the correction of the tax, and the assessment and levy of a just and legal tax by a special tribunal constituted by the act itself, namely, the Superior Court for Hartford County. Under the construction placed upon the act by the Supreme Court of the State, the Superior Court for Hartford County has authority to hear any evidence which tends to show that the Connecticut rule

of apportionment works any injustice in any given case and to correct the tax or to lay a new tax entirely as the circumstances may require.

ARGUMENT.

I.

The case of the plaintiff rests upon the facts contained in this record and not upon some other state of facts.

The brief and argument of the Plaintiff in error seems to be particularly concerned with fears of future injustice rather than proof of present injury.

The gist of the contention is that other states and other laws may superimpose burdens upon those borne by this plaintiff under the Connecticut law until the plaintiff's income will be twice or thrice taxed or dissipated entirely.

So far as relates to the Connecticut law itself the complaint is that upon another state of facts Connecticut's taxation may burden the plaintiff's property or income beyond its borders.

So we are cast upon the uncharted sea of hypothetical instances and suppositious cases far from the moorings of the present record.

We respectfully submit that the facts disclosed in this record and the writ of complaint

which instituted this action, and the assignments of error to this court, are not to be treated as a mere preface to a treatise on what might happen "if," "suppose" or "should;" but the facts disclosed in this record are the very thing now under discussion.

The writ of complaint by which this action was brought on September 26th, 1916, made certain broad assertions, namely that the plaintiff is chiefly engaged in the state of Connecticut in interstate commerce; that by far the larger part of the capital, property, and assets of the plaintiff are permanently invested and located beyond the limits of the state of Connecticut; that the greater portion of the income apportioned under the law to Connecticut was actually earned and received by the plaintiff without the state of Connecticut; and that, as a matter of fact, not over \$40,160.27 was earned or received in domestic business carried on by the applicant in Connecticut.

The proof of these assertions was essential to the plaintiff's case. The facts alleged should have been proved. But the only facts before this court are contained in an agreed statement of facts prepared by the plaintiff and assented to by the defendant, and they fall far short of proof of the assertions made. It is upon the facts contained in this record that the case must be decided.

Courts deal with things as they are.
“ Every case involving the validity of a tax must be decided upon its own facts.”

Baltic Mining Co. v. Mass., 231 U. S., 68, page 85.

This court said in *Adams Express Co. v. Ohio*, 166 U. S., 185, at page 222:

“ It is suggested that the company may have bonds, stocks or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities.”

We therefore briefly state the facts presented by the record calling particular attention to certain features therein disclosed.

II.

There is no analysis in this record of the plaintiff's net income attributable to its operations in Connecticut as distinguished from its operations outside of Connecticut

The majority of the State Court remarks (record page 52) “ On this record the amount of the plaintiff's net profit attributable to its operations in Connecticut cannot be ascertained.”

Again (record page 51).

“ Upon this record the plaintiff has made no attempt to shoulder such a burden and if it had been possible, by expert evidence or otherwise, to lay any basis of evidence for such a claim, we should suppose that the plaintiff would have, at least attempted to do so.”

And the one dissenting judge remarks (record page 61).

“ As to the balance, we do not know the exact net profit earned here and elsewhere.”

It is true that the plaintiff states (record page 23) the amount of net profits from sales and rentals in Connecticut as distinguished from the net profits from its total sales, but the only attempt to analyze, even remotely, the source of the plaintiff's net income appears in the agreed finding of facts (record pages 23 to 25), where an attempt is made to distribute territorially gross receipts from company's business, and, also, to distribute territorially an item called “ gross profits.” The item of gross profits is explained in the record, page 25, as follows:

“ The term ‘ gross profit ’ as used in this paragraph means the difference between receipts and manufacturing costs. General administrative expense, including salaries of officers, sales expense, and other like charges, *wherever incurred,*

U.S. Supreme Court, D. C.
FILE NO.
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JAMES E. HANLEY
CLERK

NO. 215

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1900

THE UNDERWOOD TYPEWRITER COMPANY

Plaintiff in Error

FREDERICK A. CHAPMAN, Attorney of the

State of Connecticut

Defendant in Error

WITNESSETH THAT ON

the 13th day of October

1900, the following

Justices of the

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Supreme Court of the United States

OCTOBER TERM, 1920—No. 215.

THE UNDERWOOD TYPEWRITER
COMPANY,
Plaintiff-in-Error,

against

FREDERICK S. CHAMBERLAIN,
Treasurer of the State of Con-
necticut,
Defendant-in-Error.

BRIEF OF LOUIS H. PORTER FOR THE ALPHA PORTLAND CEMENT COM- PANY.

This brief, with the consent of counsel of the plaintiff-in-error and by permission of the Court, is filed by me as *amicus curiae* on behalf of the Alpha Portland Cement Company.

This case involves the constitutionality of a tax imposed on foreign corporations by the State of Connecticut. The tax is, in the case of manufacturing corporations, imposed upon such a proportion of the companies' total net income from all sources "as the fair cash value of its real estate and tangible personal property in this State * * * is to the fair cash value of its entire real estate and tangible personal property

* * *." It has been construed as a franchise tax by the State Court, and this brief is written upon the assumption that this construction will be sustained by this Court.

Conn. Stat. Rev. (1918), Sec. 1394.

The State of New York imposes a similar franchise tax upon foreign manufacturing corporations. While differing in details, the base of the tax and the general theory of the apportionment of taxable income is the same in both statutes. The New York statute is printed in the appendix hereof.

(N. Y. Stat. L., 1917, Ch. 726 as amended)

The Alpha Portland Cement Company has questioned the constitutionality of a tax imposed upon it under this New York statute, and the New York Appellate Division has held the tax invalid as conflicting with the Federal Constitution.

People ex rel. Alpha Portland Cement Co. v. Knapp, 191 App. Div., 262.

This case is now pending undetermined on the State's appeal to the New York Court of Appeals.

The principle upon which taxes are assessed under these two laws is similar, and the decision of the present case, under the Connecticut statute, may have such a direct bearing upon the determination of the questions arising under the New York statute that the Alpha Portland Cement Company has directed me, on its behalf, to present to the Court this brief on the constitutionality of the law here drawn in question.

The Corporation Tax Act of Connecticut imposes a tax on property outside the jurisdiction of the State in violation of the Fourteenth Amendment and of Section Five of the Federal Constitution, and is, therefore, void.

Under the Connecticut statute, and also under the New York statute, the base upon which the tax is imposed is the total net income returned by the corporation to the Federal Treasury Department. This specifically includes income not only from the sale of merchandise, but also interest and dividends received from intangible investments in stocks and bonds. The tax is levied on a proportion of that total income determined by an allocation of tangible property. In the case of foreign corporations, these investments usually have no relation to the business in Connecticut. By disregarding these investments in determining the proportion of total income to be taxed and by including the income from these investments in the tax base, the statute in fact imposes a tax upon these investments, which are wholly without the State's jurisdiction. Often the income from such investments is very large. Sometimes it is greater than the total income from manufacturing or merchandising. In the Alpha Portland Cement Co. case (*supra*), the tax was held void because the Court found it was in fact imposed upon property beyond the State's jurisdiction.

It is clear that a State can lawfully impose a franchise tax on a foreign corporation for the privilege of exercising its corporate functions in the State. But it is also settled that a State cannot, under the guise of a franchise tax, impose a

tax which is either directly and avowedly, or in its necessary actual results, a tax on property or business without the State and beyond its jurisdiction.

International Paper Co. v. Massachusetts,
246 U. S., 135;

Looney v. Crane, 245 U. S., 178;

Fargo v. Hart, 193 U. S., 490;

Oklahoma v. Wells Fargo Co., 223 U. S.,
298.

A State having the admitted power to impose a franchise tax on a foreign corporation, can measure that tax in any proper or suitable way, as by a tax on the net income of the company derived from its business within the State. But in such cases there must be some reasonable relation between the measure of the tax and the subject taxed. The above authorities justify a paraphrase of a rule stated in *International Paper Co. v. Mass.* (*supra*) as follows:

A license fee or excise of a given per cent. of the entire net income of a foreign corporation doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States, and this because the entire net income of the corporation represents all its business of every class and all its property wherever located. Such a tax is void because in disregard of the commerce clause and the due process clause of the Constitution.

While none of the cases cited above were directly concerned with a tax measured by net income, *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429, 158 U. S., 601, established that a tax on net income was in fact and in law a tax on the source of the income. While the Court divided on certain questions in that case, it was unanimous that in the case of property over which there was a total absence of jurisdiction, as in that of Municipal bonds, a tax on the net income thereof was invalid.

Home Insur. Co. v. N. Y., 134 U. S., 594, upholding a franchise tax on a *domestic* corporation measured by its total assets, including certain United States bonds, and *Flint v. Stone Tracy Co.*, 220 U. S., 107, upholding the power of the Federal Government to impose an excise tax for the privilege of exercising corporate activities in the United States, are not in conflict with the rule as stated.

In both these cases the tax was sustained upon the ground that it was not in fact, either directly or indirectly, upon property exempt from taxation, but was in fact a tax upon a privilege which in part included the use of property itself exempt from taxation. In both cases the use of the exempt property in corporate form was a privilege that the taxing power had jurisdiction to tax.

The distinction between a tax on property and a tax on the privilege of using that property in a certain way is fundamental, and is illustrated in the cases sustaining a property tax on the instrumentalities of interstate commerce, although a tax on the use of the property in such commerce is invalid.

late Tonnage Tax Cases, 12 Wall., 204, 213.

So, too, *U. S. Glue Co. v. Oak Creek*, 247 U. S., 321, and *Peck & Co. v. Lowe*, 247 U. S., 165, are not inconsistent with the rule stated. They were income tax cases, and were both purely personal taxes dependent for their validity upon personal jurisdiction over the taxpayer. Income taxes are direct taxes on the person, and the question decided in those cases was that an income tax is not so direct a tax on the source of the income as to come within the prohibition against a tax on exports or interstate commerce. But the statute here in question is not an income tax, but a franchise or excise tax—that is, a charge imposed in return for the granting of a privilege.

In a franchise tax, the tax and its measure must have a reasonable relation to the privilege granted. If the rule as stated is not correct, and if a State can constitutionally tax a foreign corporation upon its entire net income, regardless of how little may be in any manner connected with the business in the State, the result is legalized confiscation. If each State imposed a tax of $4\frac{1}{2}\%$ (the present New York rate) on the entire net income of every corporation doing business within it, a large corporation doing business in all of the forty-eight States would be taxed more than 200% of its entire net income. Obviously the Constitution would not tolerate such a result. But a rate of $4\frac{1}{2}\%$ is not in itself objectionable. The vice of such a tax is its imposition on net income in no manner connected with the taxing State, or with the privilege granted by it.

If, then, a State cannot tax a foreign corporation on its entire net income, including therein income derived from property and business without the State and in no wise subject to the jurisdiction of

the State, it necessarily follows that the State's jurisdiction to tax income of a foreign corporation is limited to the income derived from the property or business within the State. And the constitutionality of the statute here in question depends upon whether the method prescribed for determining the taxable income is fairly calculated to determine the income from property and business within the State, or is arbitrary and calculated to impose a tax on income not subject to the State's taxing jurisdiction.

If this is a correct statement of the rule, I submit that the statute here in question is bad upon two grounds:

(1) By including income from investments in the base income to be taxed, and by excluding the value of these investments in the allocation of property to determine the proportion of income to be taxed, the statute in effect imposes a direct tax upon these investments. The tax is imposed upon an arbitrarily allocated income much greater than the company's actual taxable income.

An illustration makes the practical application clear. Assume a New York corporation having tangible assets in Connecticut of \$1,000,000, and tangible assets in New York of \$1,000,000. In the conduct of its business it uses these assets and makes a net income therefrom of 6 per cent. or of \$60,000 from its Connecticut business and \$60,000 from its New York business, a total income from operations of \$120,000 a year. It also owns and holds in New York investments in stocks and bonds of the value of \$2,000,000, from which it derives a net income of \$120,000. Its total income is, then, \$240,000. Under the Connecticut statute, one-half of this income, or \$120,000, is allocated to

and taxed by Connecticut, although the actual income from the company's business in Connecticut is only \$60,000. That is, the statute in this case imposes a tax on the income from property worth \$1,000,000 which is entirely unconnected with the company's business in Connecticut, and is beyond the State's jurisdiction.

That this statute is unconstitutional in so far as it thus imposes a tax upon the income from investments held without the State, and having no connection with the business done in the State, seems settled by *Oklahoma v. Wells Fargo Co.*, 223 U. S., 298 (*supra*).

The fact that the tax in that case was measured by gross receipts, and in the case at bar by net income seems not to be a distinction affecting the principle there decided.

(2) The fundamental assumption upon which the entire tax rests is unwarranted and must frequently result in taxing property outside the State. This assumption is that the earnings attributable to Connecticut business are the same proportion of the total net earnings as the tangible assets in Connecticut are to the total tangible assets.

The State's jurisdiction to tax is limited to persons, property and business within its borders. Applied to a franchise tax on foreign corporations measured by net income, this means its taxing jurisdiction is limited to income derived from sources or business within the State. Now, if in fact a corporation owns two mills, each of the tangible property value of \$1,000,000, one situated in Connecticut and another in New York, and the earnings of the Connecticut mill are in fact \$50,000, and of the New York mill \$100,000, it is clear-

ly arbitrary and illegal to assess and tax the Connecticut earnings at \$75,000.

But the Connecticut statute is inflexible, and unreasonably does just this. The earnings are allocated not according to actual facts, but arbitrarily upon an assumed rule, and with no provision for correction when the rule is shown to operate unfairly.

In applying the doctrine of "unity of use" so as to subject a portion of the intangible property of common carriers to local taxation by the several States in which they operate, the Court has carefully and expressly limited its application in two particulars:

(1) It has declared the rule is not applicable to manufacturing and trading companies.

Adams Express Co. v. Ohio State Auditor,
165 U. S., 194, pages 222, 227.

(2) It has held that where the application of this doctrine results in subjecting to tax by one State property having a *situs* in another, the doctrine itself, being merely one of convenience and presumption, must yield to the actual facts. The doctrine does not authorize or justify a tax on property which is in fact without the jurisdiction of the taxing State.

Adams Express Co. v. Ohio State Auditor,
166 U. S., 185, page 222;

Wallace v. Hine, (U. S. Sup. Ct., May 5,
1920, not yet reported).

Fargo v. Hart, 193 U. S., 490, page 500, where the Court said:

"So long as it fairly may be assumed that the different parts of a line are about equal in

value, a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretence."

It is clear that a corporation owning investments is, under this statute, subjected to just this condition. Under a pretence the property without the State is subjected to tax. But there is no presumption of fairness in the case of a corporation owning no such investments. It is common knowledge that the earning power of mills varies with efficiency of management, of freight rates, and of innumerable local conditions. There is in fact no such unity of use in the case of manufacturing or trading companies as usually exists with carriers. Such companies have merely a unity of ownership, which this Court sharply distinguished from the unity of use which justified the tax in the Ohio cases.

Since, then, the statutory rule of apportionment of income in many cases must result in taxing the income over which the State has no jurisdiction, and since there is no presumption or reason to believe that the statutory rule is ever fair or reasonable unless by the merest accident, I submit that the tax must be condemned as arbitrary and as imposing a tax on property without the State's jurisdiction, and in violation of the due process clause of the Federal Constitution.

Respectfully submitted,

LOUIS H. PORTER,
Amicus Curiae.

APPENDIX.**ARTICLE 9-A OF THE NEW YORK TAX LAW.****FRANCHISE TAX ON BUSINESS CORPORATIONS.****Section**

- 208. Definitions.
- 209. Franchise tax on corporations based on net income.
- 210. Corporations exempted from article.
- 211. Reports of corporations to tax commission.
- 212. Reports by corporation on basis of fiscal year.
- 213. Reports to be sworn to; forms.
- 214. Computation of tax.
- 214a. Taxation of corporations acquiring assets or franchises of other corporations.
- 215. Rate of tax.
- 216. Penalty for failure to report.
- 217. Powers of tax commission.
- 218. Revision and readjustment of accounts by tax commission.
- 219. Review of determination of tax commission by certiorari and regulations as to writ.
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- 219f. Action for recovery of taxes; forfeiture of charter by delinquent corporations.
- 219g. Deposit of revenues collected.

- 219h. Disposition of revenues collected.
- 219i. Secrecy required of officials; penalty for violation.
- 219j. Exemptions from certain other taxation.
- 219k. Limitation of time.
- 219l. Personal property defined.

208. *Definitions.*—As used in this article: 1. The term “corporation” includes a joint-stock company or association; 2. The words “tangible personal property” shall be taken to mean corporeal personal property, such as machinery, tools, implements, good, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stocks, bonds, notes, credits or evidences of an interest in property and evidences of debt; 3. The term “entire net income” means the total net income before any deductions have been made for taxes paid or to be paid to the Government of the United States on either profits or net income or for any losses sustained by the corporation in other fiscal or calendar years whether deducted by the Government of the United States or not.

209. *Franchise Tax on Corporations Based on Net Income.*—For the privilege of exercising its franchise in this State in a corporate or organized capacity every domestic corporation, and for the privilege of doing business in this State, every foreign corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November first next succeeding the first day of July in each and every year an annual franchise tax, to be computed by the

tax commission upon the basis of its entire net income for its fiscal or the calendar year next preceding, as hereinafter provided, which entire net income is presumably the same as the entire net income upon which such corporation is required to pay a tax to the United States, or as otherwise provided by section two hundred and fourteen of the Tax Law, except that the entire net income of a corporation not organized under the laws of any State within the United States which shall be taken as the basis of computation by the tax commission shall be the entire net income in fact rather than the amount earned in the United States or the amount returned to the United States Treasury Department.

210. *Corporations Exempted from Article.*—Corporations wholly engaged in the purchase and sale of, and holding title to, real estate for themselves, corporations whose sole business consists of holding the stocks of other corporations for the purpose of controlling the management and affairs of such other corporations, except such as are specifically subject to report under the provisions of subdivision nine of section two hundred and eleven of the Tax Law, and corporations liable to tax under section one hundred and eighty-four to one hundred and eighty-nine, inclusive, of this chapter, banks, savings banks, institutions for savings, title guaranty, insurance or surety corporations shall be exempt from the payment of the taxes prescribed by this article.

211. *Reports of Corporations to Tax Commission.*—Every corporation taxable under this article as well as foreign corporations having of-

ficers, agents or representatives within the State shall annually on or before July first, or within thirty days after the making of its report of entire net income to the United States Treasury Department for any fiscal or calendar year, preceding said first day of July, transmit to the tax commission a report in the form prescribed by the tax commission specifying:

1. The name and location of the principal place of business of such corporation, the State under the laws of which organized, and the date thereof; the amount of its issued capital stock and the kind of business transacted. Any corporation not organized under the laws of any State within the United States shall state the facts in relation to its entire net income wherever earned and as though organized under the laws of this State, and instead of stating its income as returned to the United States Treasury Department.

2. The amount of its entire net income for its preceding fiscal or the preceding calendar year, as shown in the last return of annual net income made by it to the United States treasury department, except as provided in subdivision one of this section. If the corporation shall claim that the return made to the United States treasury department was inaccurate, the amount claimed by it to be the net income for such period shall be specified. If any deduction has been allowed for losses sustained by the corporation in prior years the amount so allowed and deducted shall be specified.

3. The average monthly value for the fiscal or calendar year of its real property and tangible personal property in each city, village or portion

of a town outside of a village within the State, and the average monthly value of all its real property and tangible personal property wherever located.

4. The average monthly value for the fiscal or calendar year of bills and accounts receivable arising from (a) personal property sold by the corporation from merchandise manufactured by it within this State; (b) personal property owned by the corporation and not manufactured by it within this State but sold by it or its agents and located within the State at the time of the receipt of the order; (c) the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the State, and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this State; and (d) services performed by any officer, agent or representative of the corporation connected with, sent from or reporting either directly or indirectly to any officer located in this State (150). Also the average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from the manufacture by it of personal property or the purchase or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans.

5. The average total value for the fiscal or calendar year of the stock of other corporations owned by the corporation, and the proportion of the average value of the stock of such other corpora-

tions within the State of New York, as allocated pursuant to section two hundred and fourteen of this chapter.

6. If the corporation has no real or tangible personal property within the State, the city, village or portion of a town outside of a village in the State in which is located the office in which its principal financial concerns within the State are transacted.

7. Such other facts as the tax commission may require for the purpose of making any computation required by this article, or for the purpose of comparison with former reports to determine whether or not such reports were erroneous or fraudulent.

8. Any corporation taxable hereunder upon its entire net income may omit from its report the statements required by subdivisions four and five by incorporating in its report a consent to be taxed upon its entire net income. Corporations having no net income shall, however, complete the segregation of assets in every case.

9. Any corporation owning or controlling, either directly or indirectly, substantially all of the capital stock of another corporation, or of other corporations, liable to report under this article, may be required to make a consolidated report showing the combined entire net income, such assets of the corporations as are required for the purposes of this article, and such other information as the tax commission may require, but excluding intercorporate stockholdings and intercorporate accounts.

The tax commission may permit the filing of a combined report where substantially all the capital

stock of two or more corporations liable to taxation under this article is owned by the same interests. The tax commission may impose the tax provided by this article as though the combined entire net income and segregated assets were those of one corporation, or may, in such other manner as it shall determine, equitably adjust the tax.

Where any corporation liable to taxation under this article conducts the business, whether under agreement or otherwise, in such manner as either directly or indirectly to benefit the members or stockholders of the corporation, or any of them, or any person or persons, directly or indirectly interested in such business by selling its products or the goods or commodities in which it deals at less than a fair price which might be obtained therefor, or where such a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products of the corporation so owning the substantial portion of its capital stock in such a manner as to create a loss or improper net income, the tax commission may require such facts as it deems necessary for the proper computation provided by this article, and may for the purpose of the act determine the amount which shall be deemed to be the entire net income of the business of such corporation for the calendar or fiscal year, and in determining such entire net income the tax commission shall have regard to the fair profits which, but for any agreement, arrangement or understanding, might be or could have been obtained from dealing in such products, goods or commodities.

212. Reports by Corporation on Basis of Fiscal Year.—A corporation which reports to the United

States Treasury Department on the basis of its fiscal year, may report to the tax commission upon the same basis, except as provided in Section 214-a of this chapter.

213. Reports To Be Sworn To; Forms.—Every report required by this article shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the corporation to the effect that the statements contained therein are true. Blank forms of report shall be furnished by the tax commission on application, but failure to secure such a blank shall not release any corporation from the obligation of making a report herein required. The commission may require a further or supplemental report under this article to contain further information and data necessary for the computation of the tax herein provided.

214. Computation of Tax.—If the entire business of the corporation be transacted within the State, the tax imposed by this article, if imposed upon the entire net income, shall be based upon the entire net income of such corporation for such fiscal or calendar year as defined in Section 208 of this chapter, subject, however, to any correction thereof for fraud, evasion or error, as ascertained by the State tax commission. If the entire business of such corporation be not transacted within the State, the tax imposed by this article shall be based upon a proportion of such entire net income, to be determined in accordance with the following rules: The proportion of the entire net income of the corporation upon which the tax under this article shall be based shall be such

portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the State.

2. The average monthly value of bills and accounts receivable arising from (a) personal property sold by the corporation from merchandise manufactured by it within the State; (b) personal property owned by the corporation and not manufactured by it within this State, but sold by it or its agents and located within the State at the time of the receipt of the order; (c) the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the State, and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this State; and (d) services performed by any officer, agent or representative of the corporation connected with, sent from, or reporting, either directly or indirectly, to any officer located in this State or at any office located, owned, rented or occupied in this State.

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the State as provided by this section, but not exceeding 10 per centum of the real and tangible personal property segregated to this State under this article, bears to the aggregate of

4. The average monthly value of all the real property and tangible personal property of the corporation, wherever located.

5. The average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from (a) personal property sold by the corporation from merchandise manufactured by it within and without this State; and (b) the purchase, or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans.

6. The average total value of stocks of other corporations owned by the corporation, but not exceeding 10 per centum of the aggregate real and tangible personal property set up in this report.

7. In case any report is made as provided by Subdivision 9 of Section 211 of the tax law, the tax commission may assess the tax against either of the corporations whose assets or net income are involved in the report and upon the basis of the combined entire net income and the combined segregated assets of the corporation and upon such other information as it may possess, or may adjust the tax in such other manner as it shall determine to be equitable.

Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall, for purposes of allocation of assets, be apportioned in and out of the State in accordance with the value of the physical property in and out of the State representing such share stock.

It is further provided that every domestic corporation exercising its franchise in this State and every foreign corporation doing business in this State, other than those exempted by Section 210 of this chapter, shall be subject to a minimum tax of not less than \$10 and not less than one mill upon each dollar of such a part of its issued capital stock, at its face value, as the amount of its gross assets employed by it in its business in this State bears to its gross assets wherever employed by it in its business. If such a corporation has stock without par value, then the base of the tax shall be such a portion of its issued capital stock as its gross assets employed in its business in this State bear to the entire gross assets employed in its business and its shares without par value shall be deemed to have a face value of \$100 each for the purposes of this assessment.

If such a corporation is subject to a tax at the rate of one mill, and it maintains no regular place of business outside this State, except a statutory office, it shall be taxed upon its entire issued capital stock as herein provided.

214-a. Taxation of Corporations Acquiring Assets or Franchises of Other Corporations.—If any corporation taxable under this article shall acquire either directly, indirectly, or by merger or consolidation, the major portion of the assets or the franchise of another corporation or of corporations exercising any franchise or franchises or doing any business in this State during any year, it shall include in its own next annual return, in addition to its own entire net income, so much of the entire net income of the corporation or corporations whose assets or franchises it ac-

quired as shall not have been used or included in measuring a franchise tax to this State, and shall be taxed upon such combined entire net incomes for the year to ensue and as hereinbefore provided. The provisions for a minimum tax shall be applied only when under such provisions a tax will result in excess of the amount which would be produced by a tax on entire net income as hereinbefore provided and then in lieu thereof.

This section shall be construed as having been in effect as of the date of the original enactment of Article 9-a of the tax law, as added by Chapter 726 of the laws of 1917.

215. *Rate of Tax.*—The tax imposed by this article shall be at the rate of 4 1-2 per centum of the entire net income of the corporation or portion thereof taxable within the State, determined as provided by this article, unless taxable upon its capital stock at the rate of one mill or subject to the minimum tax of \$10, as provided in Section 214 of the tax law.

216. *Penalty for Failure to Report.*—Any corporation which fails to make any report required by this article shall be liable to a penalty of not more than \$5,000, to be paid to the State, to be collected in a civil action, at the instance of the tax commission; and any officer of any such corporation who makes a fraudulent return or statement with intent to defeat or evade the payment of the taxes prescribed by this article shall be liable to a penalty of not more than \$1,000, to be collected in like manner. All moneys recovered as penalties for a failure to report or for making fraudulent reports shall be paid to the State Comptroller.

217. *Powers of Tax Commission.* -The tax commission may for good cause shown extend the time within which any corporation is required to report by this article. If any report required by this article be not made as herein required, the tax commission is authorized to make an estimate of the net income of such corporation and of the amount of tax due under this article, from any information in its possession, and to order and state an account according to such estimate for the taxes, penalties and interest due to the State from such corporation. All the authority and powers conferred on the tax commission by the provision of section one hundred and ninety-five of the tax law shall have full force and effect in respect of corporations which may be liable hereunder.

218. *Revision and Readjustment of Accounts by Tax Commission.*—If an application for revision be filed with the commission by a corporation against which an account is audited and stated within one year from the time any such account shall have been audited and stated, the commission shall grant a hearing thereon and if it shall be made to appear upon any such hearing, by evidence submitted to it or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such account, the commission shall resettle the same according to law and the facts, and adjust the accounts for taxes accordingly, and may, in its discretion, modify the penalty imposed for failure to report as provided in this article, and shall send notice of its determination thereon to the corporation and State Comptroller forthwith.

219. Review of Determination of Tax Commission by Certiorari and Regulations as to Writ.—The determination of the commission upon any application made to it by any corporation for revision and resettlement of any account, as prescribed by this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter.

No certiorari to review any audit and statement of an account or any determination by the commission under this article shall be granted unless notice of application therefor is made within thirty days after the service of the notice of such determination. Eight days' notice shall be given to the commission of the application for such writ. The full amount of the taxes, percentage, interest and other charges audited and stated in such account must be deposited with the State Comptroller before making the application and an undertaking filed with the commission, in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such writ is dismissed or the determination of the commission affirmed, the applicant for the writ will pay all costs and charges which may accrue against it in the prosecution of the writ, including costs of all appeals.

219-a. Audit and Statement of Tax.—On or before the first day of December in each year the tax commission shall audit and state the account of each corporation known to be liable to a tax under this article, for its preceding fiscal or the preceding calendar year, and shall compute the tax thereon and forthwith notice the same to the State Comptroller for collection. The tax commis-

sion shall determine the portion of such tax to be distributed to the several counties and the amounts to be credited to the several cities or towns thereof, when the same is collected, and shall indicate such determination in noticing such tax to the State Comptroller. If the corporation has real property or tangible personal property located in a village, or if it has no real or tangible personal property in the State, but the office in which its principal financial concerns within the State are transacted is located in a village, the tax commission shall indicate such facts to the State Comptroller, with the name of the village in which such officer or property is located.

219-b. *Notice of Tax.*—Every report required by section two hundred and eleven of this chapter shall contain the post-office address of the corporation and lines or spaces upon which the corporation shall enter its entire net income. Notice of tax assessment shall be sent by mail to the post-office address given in the report, and the record that such notice has been sent shall be presumptive evidence of the giving of the notice and such record shall be pre-reserved by the tax commission.

219-c. *When Tax Payable.*—The tax hereby imposed shall be paid to the State Comptroller on or before the first day of January of each year, or within thirty days after notice of the tax has been given as provided in section two hundred and nineteen-b of this chapter if such notice is given subsequent to the first day of December of the year for which such tax is imposed. If such tax be not so paid, or in the case of additional taxes, if not paid within thirty days after notice of such addi-

tional tax has been given as provided in section two hundred and nineteen-d of this chapter and such notice of additional tax is given subsequent to the first day of December of the year for which such additional tax is imposed, the corporation liable to such tax shall pay to the state comptroller, in addition to the amount of such tax, or additional tax, ten per centum of such amount, plus one per centum for each month the tax or additional tax remains unpaid, but the State Comptroller upon submission to him of satisfactory proof that the failure to pay such taxes, or additional taxes, within the time prescribed in this article, was not willful or evasive, may modify the exaction to not less than one per centum for each month following the due date of the tax. Each such tax or additional tax shall be a lien upon and binding upon the real and personal property of the corporation liable to pay the same from the time when it is payable until the same is paid in full.

219-d *Corrections and Changes.*—If the amount of the net income for any year of any corporation taxable under this article as returned to the United States Treasury Department is changed or corrected by the Commissioner of Internal Revenue or other officer of the United States or other competent authority, such corporation, within ten days after receipt of notice of such change or correction, shall make return under oath or affirmation to the tax commission of such changed or corrected net income, and shall concede the accuracy of such determination or state wherein it is erroneous.

The tax commission shall ascertain, from such return and any other information in the possession of the commission, the entire net income of such corporation for the fiscal or calendar year for which such change or correction has been made by such commissioner of internal revenue or other officer or authority. All the authority conferred on the tax commission by the provisions of section one hundred and ninety-five of this chapter is hereby granted to it in respect to the ascertainment of such entire net income. The tax commission shall thereupon reaudit and restate the account of such corporation for taxes based upon the entire net income for such fiscal or calendar year, such reaudit to be according to the entire net income so ascertained by the tax commission. The proceedings and determination of the tax commission in the making of such reassessment may be revised and readjusted and reviewed in the manner provided by sections two hundred and eighteen and two hundred and nineteen of this chapter, as in the case of an original assessment of the tax. If from such reassessment it appears that such corporation shall have paid under this article an excess of tax for the year for which such reassessment is made, the tax commission shall return a statement of the amount of such excess to the comptroller, who shall credit such corporation with such amount. Such credit may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit on filing with the commission such assignment shall thereupon be entitled to credit upon the books of the comptroller for the amount

thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally been allowed in favor of such assignee. If from such reassessment it appears that an additional tax is due from such corporation for such year, such corporation shall, within thirty days after notice has been given as provided in section two hundred and nineteen-b of this chapter by the tax commission, pay such additional tax.

219-e. *Warrant for the Collection of Taxes.*—If the tax imposed by this article be not paid within thirty days after the same becomes due, unless an appeal or other proceeding shall have been taken to review the same, the Comptroller may issue a warrant under his hand and official seal directed to the sheriff of any county of the State commanding him to levy upon and sell the real and personal property of the corporation owning the same, found within his county, for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant, and to return such warrant to the Comptroller and pay to him the money collected by virtue thereof by a time to be therein specified, not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the corporation against whom it is issued from the time an actual levy shall be made by virtue thereof. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a court

of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner.

219-f. Action for Recovery of Taxes; Forfeiture of Charter by Delinquent Corporations.—Action may be brought at any time by the attorney-general at the instance of the Comptroller, in the name of the State, to recover the amount of any taxes, penalties and interest due under this article. If such taxes be not paid within one year after the same be due, and the Comptroller is satisfied that the failure to pay the same is intentional, he shall so report to the attorney-general, who shall immediately bring an action in the name of the people of the State for the forfeiture of the charter or franchise of any corporation failing to make such payment, and if it be found that such failure was intentional, judgment shall be rendered in each action for the forfeiture of such charter and for its dissolution if a domestic corporation, and if a foreign corporation for the annulment of its franchise to do business in this State.

219-g. Deposit of Revenues Collected.—The State Comptroller shall deposit all taxes, interest and penalties collected under this article in responsible banks, banking houses or trust companies in the State which shall pay the highest rate of interest to the State for such deposit, to the credit of the State Comptroller on account of the franchise tax. And every such bank, banking house or trust company shall execute and file in his office an undertaking to the State, in the sum, and with such sureties, as are required and approved by the Comptroller, for the safe keeping and prompt payment on legal demand therefor of

all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the Comptroller may fix. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney-general as to its form. The State Comptroller shall on the first day of each month make a verified return to the State Treasurer of all revenues received by him under this article during the preceding month, stating by whom and when paid, and shall credit himself with all payments made to county treasurer since his last previous return pursuant to section two hundred and nineteen-h of this chapter.

219-h. Disposition of Revenues Collected.—The State Comptroller shall, on or before the twenty-fifth day of each month, pay into the State Treasury, to the credit of the general fund, all interest and penalties and two-thirds of all taxes received by him under this article during the preceding calendar month, as appears from the return made by him to the State Treasurer. The balance of all taxes collected and received by him under this article from any corporation, as appears from the return made by him to the State Treasurer, shall, on or before the twenty-fifth day of April, July, October and January, for the quarter ending with the last day of the preceding month, be distributed and paid by him to the Treasurers of the several counties of the State and disposed of by such Treasurers, in accordance with the following rules:

1. If the corporation has no tangible personal property within the State, such payment shall be

made to the county treasurer of the county in which is located the office at which its principal financial concerns within the State are transacted:

2. If the corporation has tangible personal property, as shown by its report pursuant to section two hundred and eleven, in but one city or town of the State, such payment shall be made to the county treasurer of the county in which such city or town is located.

3. If the corporation has tangible personal property in more than one city or town of the State, as shown by its report pursuant to section two hundred and eleven, such payment shall be made to the county treasurers of the counties in which such cities or towns are located in the proportion that the average monthly value of the tangible personal property of such corporation in the cities and towns of such county bears to the average monthly value of all its tangible personal property within the State.

4. In making such payment to a county treasurer, the State Comptroller shall indicate the portion thereof to be credited to any city or town within the county on account of the location therein of its principal financial office or property as determined by the preceding subdivisions and if such principal financial office or property is located in a village shall indicate the village in which it is located; if such principal financial office or property is located in a city or in a town outside of a village, the whole of such portion shall be paid to such city or town as hereinafter provided; if such principal financial office or

property is located in a village, there shall be paid to such village as hereinafter provided such a part of the entire amount credited to the town as the entire amount of taxes raised by said village, or portion thereof in said town, during the preceding calendar year for village and town purposes bears to the aggregate amount so raised by the town and village during the preceding calendar year for town and village purposes.

5. As to any county wholly included within a city, such payment shall be made to the chamberlain or other chief fiscal officer of such city and be paid into the general fund for city purposes.

6. As to any county not wholly included within a city the county treasurer shall, within ten days after the receipt thereof, pay to the chief fiscal officer of a city or to the chief fiscal officer of a village or to the supervisor of a town the portion of money received by him from the State Comptroller, to which such city, village or town is entitled, which shall be credited by such officer to general city, village or town purposes.

219-i. Secrecy Required of Officials; Penalty for Violation.—1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for any tax commissioner, agent, clerk or other officer or employee to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report under this article. Nothing herein shall be construed to prohibit the publication of statistics so classified as to prevent the identification of particular reports and the items thereof, or the publication of delinquent lists showing the

names of taxpayers who have failed to pay their taxes at the time and in the manner provided by section two hundred and nineteen-c, together with any relevant information which, in the opinion of the Comptroller, may assist in the collection of such delinquent taxes, or the inspection by the Attorney-General or other legal representatives of the State of the report of any corporation which shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted in accordance with the provisions of sections two hundred and sixteen or two hundred and nineteen-f of this article:

Reports shall be preserved for three years, and thereafter until the State tax commission orders them to be destroyed.

2. Any offense against the foregoing provision shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the Court, and if the offender be an officer or employee of the State he shall be dismissed from office and be incapable of holding any public office in this State for a period of five years thereafter.

219-j. *Exemption From Certain Other Taxation.*—After this article takes effect, corporations taxable thereunder shall not be assessed on any personal property, or on capital stock as provided for in section twelve of this chapter.

219-k. *Limitation of Time.*—The provisions of the Code of Civil Procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the

collection of any tax or penalty prescribed by this article.

219-1. *Personal Property Defined.*—The term “personal property,” for the purposes of the exemption from assessment and taxation thereon locally as granted by section two hundred and nineteen-j of this chapter, shall include any movable machinery and equipment used for trade or manufacture and not essential for the support of the building, structure or superstructure, and removable without material injury thereto. The term “personal property,” as used in such section, shall not include boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than counter-shafting, equipment for the distribution of heat, light, power, gases and liquids, nor any equipment consisting of structures or erections to the operation of which machinery is not essential. An owner of a building is entitled to the same exemption under this section as a lessee.



UNDERWOOD TYPEWRITER COMPANY v.
CHAMBERLAIN, TREASURER OF THE STATE
OF CONNECTICUT.

ERROR TO THE SUPERIOR COURT OF THE STATE OF
CONNECTICUT.

No. 215. Argued October 13, 14, 1920.—Decided November 15, 1920.

1. A state tax upon the proportion of the net profits of a sister-state corporation earned by operations conducted within the taxing State, the enforcement of which is left to the ordinary means of collecting taxes, does not violate Art. I, § 8, of the Federal Constitution by imposing a burden upon interstate commerce. P. 119.
2. In considering whether a state tax, purporting to be on the net income of a sister-state corporation earned within the taxing State, violates the Fourteenth Amendment by reaching income earned outside, it is not necessary to decide whether it is a direct tax on income or an excise measured by income. P. 120.
3. A state tax upon the income of a sister-state corporation manufacturing its product within the State but deriving the greater part of its receipts from sales outside the State, which attributes to processes conducted within the State the proportion of the total net income which the value of real and tangible personal property

owned by the corporation within the State bears to the value of all its real and tangible personal property, is not inherently unreasonable and calculated to tax income earned beyond the borders of the State; and, unless it be shown to be so in its application to the particular case, cannot be held to violate the due process clause of the Fourteenth Amendment. P. 120.

4. Held, that the fact that the amount of net income so allocated to the taxing State greatly exceeded in this case the portion actually received there, does not prove that income earned outside was included in the assessment.
 5. The principle discussed in *Southern Ry. Co. v. Greene*, 216 U. S. 400, 414, respecting the right of a State under the Fourteenth Amendment to impose discriminatory taxes on a sister-state corporation which had made large permanent investments in railroad property in the State before the tax law was enacted, is inapplicable to this case, involving a non-discriminatory tax on the locally earned income of a manufacturing corporation. P. 122.
- 94 Connecticut, 47, affirmed.

THE case is stated in the opinion.

Mr. Arthur M. Marsh and Mr. Arthur L. Shipman, with whom Mr. Charles Strauss and Mr. Eugene D. Boyer were on the brief, for plaintiff in error:

Assuming the tax to be what the statute itself says that it is, namely, a tax on net income:

Taxation upon net income is either (a) a direct tax upon the property out of which the income issues, which is another way of saying that it is upon the tangible and intangible assets of the corporation, or (b) it is a tax upon net income, as such, as a species of property disconnected from all other assets of the corporation.

If this tax falls under (a), it is clearly invalid, since, under the Connecticut allocation, that State takes 47 per cent. of all the property and, accordingly, is taxing assets outside of Connecticut, no allowance for intangibles being made.

If this tax falls under (b), then the situs of the net income, which is the property that is taxed, is all important,

and whether such situs is exclusively in Delaware as the domicile of the corporation, or is localized in part in various States, it certainly is not lawfully allocated by a division among the States upon a comparison of tangible assets only.

If the tax is a property tax upon the assets of the corporation in Connecticut, it is invalid because it is not dependent in fact on the value of such assets, no appraisal being provided, no recourse to the courts for ascertainment or correction of the valuation except as to the relative value of tangible assets in Connecticut to tangible assets everywhere, and there being no provision for ascertainment of their value unless by an arbitrary form of application of the so-called unit rule. This fundamental error is emphasized by the fact that there is no allowance or deduction for stocks, bonds, accounts receivable, bank deposits or other intangible assets of that character located outside of Connecticut.

If the tax could possibly be considered as a tax on property of the corporation in Connecticut measured by part of the net income, it is invalid because it is based upon the false assumption that net income is produced, and has a local situs, in proportion to the relative location of tangible assets only.

If the tax is regarded as an excise for the privilege of doing business in Connecticut, to be valid it should have been confined to the subject-matter which Connecticut is entitled to control; that is, the manufacturing and the business purely intrastate, consisting of sales and shipments from Hartford to Connecticut customers, also leases, repairs, etc., in Connecticut for Connecticut customers, and probably if it is such an excise, it must have a suitable maximum. At all events, it must have some logical or reasonable relation to the exercise or value of these privileges.

If not described and intended as such an excise, it

should, at the very least, operate in effect as such. But the measure adopted having no relation whatever to intrastate sales, leases and repairs, etc., and only the most arbitrary relation to manufacturing carried on in Connecticut, and having no maximum, cannot be regarded as satisfying the law. Forty-seven per cent. of the net income is arrogated to itself by Connecticut purely on the basis of tangible assets in Connecticut on a given day of the year, without any consideration of the volume of manufacturing at the factory or the ratio of income which might be said to issue out of the manufacturing operations, and the allocation is without allowance or opportunity for adjustment on account of varying ratios of net income produced by the various operations of the corporation, and without deduction on account of income issuing entirely and wholly out of business having no connection with Connecticut.

We submit that it was not intended by the legislature as an excise and, whether it was or not, its operation and effect render it invalid because it is unreasonable, arbitrary and has not even a remote relation to the business privileges which Connecticut can control. Furthermore, even regarding net income as a measure only, it is not open to Connecticut to assess foreign corporations upon data so irrelevant, so inadequate and so remotely related, both commercially and logically, to the exercise of local business privileges.

Upon every one of the above alternative theories of this tax, it either transgresses the commerce clause, or the due process clause, or it discriminates unlawfully against the foreign corporation, principally engaged in interstate commerce and established in the State prior to this legislation.

Mr. James E. Cooper and Mr. Hugh M. Alcorn, with whom Mr. Frank E. Healy, Attorney General of the State of Connecticut, was on the brief, for defendant in error.

Mr. Louis H. Porter, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This action was brought by the Underwood Typewriter Company, a Delaware corporation, in the Superior Court for the County of Hartford, Connecticut, to recover the amount of a tax assessed upon it by the latter State and paid under protest. The company contended that as applied to it the taxing act violated rights guaranteed by the Federal Constitution. The constitutional questions involved were reserved by that court for consideration and advice by the Supreme Court of Errors. The answers to these questions being favorable to the State, 94 Connecticut, 47, judgment was entered by the Superior Court confirming the validity of the tax. The case comes here on writ of error to that court.

Connecticut established in 1915 a comprehensive system of taxation applicable alike to all foreign and domestic corporations carrying on business within the State. This system prescribes practically the only method by which such corporations are taxed, other than the general property tax to which all property located within the State, whether the owner be a resident or a non-resident, an individual or corporation, is subject. The act divides business corporations into four classes and the several classes are taxed by somewhat different methods. The fourth class, "Miscellaneous Corporations," includes, among others, manufacturing and trading companies, and with these alone are we concerned here. Upon their net income, earned during the preceding year from business carried on within the State a tax of two per cent. is imposed annually. The amount of the net income is ascertained by reference to the income upon which the corpora-

tion is required to pay a tax to the United States. If the company carries on business also outside the State of Connecticut, the proportion of its net income earned from business carried on within the State is ascertained by apportionment in the following manner: The corporation is required to state in its annual return to the tax commissioner from what general source its profits are principally derived. If the company's net profits are derived principally from ownership, sale or rental of real property, or from the sale or use of tangible personal property, the tax is imposed on such proportion of the whole net income, as the fair cash value of the real and the tangible personal property within the State bears to the fair cash value of all the real and tangible personal property of the company. If the net profits of the company are derived principally from intangible property the tax is imposed upon such proportion of the whole net income as the gross receipts within the State bear to the total gross receipts of the company. A corporation aggrieved because of a tax assessed upon it may after paying the tax apply for relief to the Superior Court for the County of Hartford. There it may show cause why it is not subject to the tax or why the tax should have been less. If the whole tax assessed is found by the court to be proper, it enters judgment confirming the same. If the tax is found to be for any reason unauthorized in whole or in part the court enters judgment for the company in the amount with interest which it is entitled to recover; and the state treasurer is directed to pay the same. The decision of the superior court is subject to review by the Supreme Court of Errors as in other cases. Laws of 1915, c. 292, part IV, §§ 19-29; *Underwood Typewriter Co. v. Chamberlain*, 92 Connecticut, 199.

The Underwood Typewriter Company is engaged in the business of manufacturing typewriters and kindred articles; in selling its product and also certain accessories and supplies which it purchases; and in repairing and

renting such machines. Its main office is in New York City. All its manufacturing is done in Connecticut. It has branch offices in other States for the sale, lease and repair of machines and the sale of supplies; and it has one such branch office in Connecticut. All articles made by it—and some which it purchases—are stored in Connecticut until shipped direct to the branch offices, purchasers or lessees. In its return to the tax commissioner of Connecticut, made in 1916 under the above law, the company declared that its net profits during the preceding year had been derived principally from tangible personal property; that these profits amounted to \$1,336,586.13; that the fair cash value of the real estate and tangible personal property in Connecticut was \$2,977,827.67, and the fair cash value of the real estate and tangible personal property outside that State was \$3,343,155.11. The proportion of the real estate and tangible personal property within the State was thus 47 per cent. The tax commissioner apportioned that percentage of the net profits, namely \$629,668.50, as having been earned from the business done within the State, and assessed thereon a tax of \$12,593.37, being at the rate of two per cent. The company having paid the tax under protest, brought this action in the Superior Court for the County of Hartford to recover the whole amount.

First. It is contended that the tax burdens interstate commerce and hence is void under § 8 of Article I of the Federal Constitution. Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 364; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A

tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 695. This tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled. *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321; *Shaffer v. Carter*, 252 U. S. 37, 57. Compare *Peck & Co. v. Lowe*, 247 U. S. 165. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause.

Second. It is contended that the tax violates the Fourteenth Amendment because, directly or indirectly, it is imposed on income arising from business conducted beyond the boundaries of the State. In considering this objection we may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the State or a direct tax upon that income; for the "argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution." *Shaffer v. Carter*, 252 U. S. 37, 55. In support of its objection that business outside the State is taxed plaintiff rests solely upon the showing that of its net profits \$1,293,643.95 was received in other States and \$42,942.18 in Connecticut, while under the method of apportionment of net income required by the statute 47 per cent. of its net income is attributable to operations in Connecticut. But this showing wholly fails to sustain the objection. The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in

attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State. "The plaintiff's argument on this branch of the case," as stated by the Supreme Court of Errors, "carries the burden of showing that 47 per cent. of its net income is not reasonably attributable, for purposes of taxation, to the manufacture of products from the sale of which 80 per cent. of its gross earnings was derived after paying manufacturing costs." The corporation has not even attempted to show this; and for aught that appears the percentage of net profits earned in Connecticut may have been much larger than 47 per cent. There is, consequently, nothing in this record to show that the method of apportionment adopted by the State was inherently arbitrary,¹ or that its application to this corporation produced an unreasonable result.

We have no occasion to consider whether the rule prescribed if applied under different conditions might be obnoxious to the Constitution. *Adams Express Co. v. Ohio*, 166 U. S. 185, 222. Nor need we consider the contention made on behalf of the State, that the statute is necessarily valid, because the prescribed rule of apportionment is not rigid, and provision is made for rectifying by proceedings in the Superior Court any injustice resulting from its application.

¹ Compare *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 552; *Pittsburg, etc., Ry. Co. v. Backus*, 154 U. S. 421, 430; *Cleveland, etc., Ry. Co. v. Backus*, 154 U. S. 439, 445; *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 14; *Adams Express Co. v. Ohio*, 165 U. S. 194, 221; 166 U. S. 185; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 75; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 152; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 365.

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Third. It is stated in the brief, doubtless inadvertently, that the assignment of errors includes the objection that the tax was void under the Fourteenth Amendment also on the ground that the company, a foreign corporation, had made large permanent investments in Connecticut before the statute of 1915 was enacted. No such error appears to have been specifically assigned and the objection was not pressed in brief or oral argument. It is clearly unsound. To the facts presented here the principle discussed in *Southern Ry. Co. v. Greene*, 216 U. S. 400, 414, has no application.

Affirmed.